Supreme Court, U.S.
FILED

06-542 OCT 17 2006

OFFICE OF THE CLERK

No. 06-

IN THE

Supreme Court of the United States

DF, by his Parent and Natural Guardian,
ANDREW FINKLE,

Petitioner,

v.

BOARD OF EDUCATION OF SYOSSET CENTRAL SCHOOL DISTRICT; JAMES KASSEBAUM, Both Individually and In His Capacity as Principal of the HARRY B. THOMPSON MIDDLE SCHOOL; and CAROLE G. HANKIN, Both Individually and in Her Capacity as Superintendent of the SYOSSET CENTRAL SCHOOL DISTRICT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a public school district is required to conduct an evidentiary hearing prior to suspending a student for greater than 10 days, and does the utilization of anonymous written statements to establish the charges against a student that result in a 30-day suspension violate the procedural due process requirements of the United States Constitution.

2. Whether in a public school setting determining that a student's journal entry is a true threat not protected by the First Amendment and creates a substantial risk of disruption may be made based solely on the content of the journal entry without a court making a factual inquiry as to the context in which the story was written and read aloud.

PARTIES TO THE PROCEEDING

The petitioner is DF, by his parent and natural guardian, Andrew Finkle. Respondents who were respondents in the Court of Appeals are: Board of Education of the Syosset Central School District; James Kassebaum, both individually and in his capacity as the principal of the Harry B. Thompson Middle School; and Carole G. Hankin, both individually and in her capacity as the Superintendent of the Syosset Central School District.

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IN THE SUPREME COURT OF THE UNITED STATES

DF, by his Parent and Natural Guardian,
ANDREW FINKLE,

Petitioner,

v.

BOARD OF EDUCATION OF SYOSSET CENTRAL SCHOOL DISTRICT; JAMES KASSEBAUM, Both Individually and In His Capacity as Principal of the HARRY B. THOMPSON MIDDLE SCHOOL; and CAROLE G. HANKIN, Both Individually and in Her Capacity as Superintendent of the SYOSSET CENTRAL SCHOOL DISTRICT

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

E. Christopher Murray, on behalf of DF, by his parent and natural guardian, Andrew Finkle, respectfully petitions for a writ of certiorari to review the judgment of the

United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Summary Order of the United States Court of Appeals for the Second Circuit (Pet. App. 1-3) is not reported. The opinion of the United States District Court for the Eastern District of New York (Pet. App. 4-20) is reported at 386 F.Supp.2d 119.

JURISDICTION

The Summary Order of the United States Court of Appeals for the Second Circuit affirming the Judgment of the United States District Court for the Eastern District of New York was entered on May 9, 2006. The Order denying the Petition for Rehearing was entered on July 21, 2006 (Pet. App. 23-24). This Petition is being filed within 90 days of the Order of the Court of Appeals for the Second Circuit denying the Petition for Rehearing. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant provisions of the First and Fourteenth Amendments of the United States Constitution; 42 U.S.C. §1983; Fed.R.Civ.P. 12(b)(6) and New York State's *Education Law* §3214 are set out in an appendix to this petition (Pet. App. 25-33).

STATEMENT

This Court held in *Goss v. Lopez*, 419 U.S. 565 (1975), that a student has a property and liberty interest in a public education, and that the due process clause of the United States Constitution requires that before a short suspension is imposed, a student must be given notice of the charges against him, the basis of the accusation, and the student must be given an opportunity to explain his version of the facts. This Court specifically rejected a requirement for a full evidentiary hearing in the context of a suspension lasting ten days or less, but also explained that if a

suspension is for a longer period, additional procedural safeguards may be required. In the over 30 years since *Goss v. Lopez*, this Court has not addressed whether an evidentiary hearing is required for a lengthy suspension from public school, and, if so, does allowing into evidence anonymous statements comport with the Fourteenth Amendment's procedural due process requirements.

This case arises from the 30-day suspension of a 10-year-old boy for writing in his personal journal a fictional story modeled after the horror movie *Halloween*. As set forth in the Amended Complaint (Pet. App. 34-51), DF was a sixth grade student at the Harry B. Thompson Middle School when his English teacher told DF and the other students that they should maintain, through the school year, a journal where the students should "express thoughts, concerns or feelings". No instructions were given as to what should be written or what type of material would be considered inappropriate. To the contrary, DF and the other students were advised that they were free to write whatever they wanted in the journal, including poems and fictional stories, and the journal was to be a forum where DF and the other students could utilize and develop creative writing abilities.

Following these instructions, DF wrote short stories and numerous poems in his journal and began a "chapter book" modeled on the horror film *Halloween*. The story describes a Halloween party and a character with the same first name as DF committing murders, and the police shooting a boy. In the story, the names of certain characters – including characters that are brutally assaulted – are the same as actual students at DF's school. However, DF's parents instructed DF that the names of other students should only be included if they gave him permission.

On October 3, 2003, at the urging of his fellow students and with the permission of his English teacher, DF read a portion of his "chapter book" to his English class without incident and without any complaints. However,

when later that same day DF asked his instructor at a voluntary "Latin at Lunch" program if he could read his Halloween story, DF was told by the instructor that she had to read the story first. The instructor then read DF's story to herself and reported it to the school principal. DF's story was never read to the students at the "Latin at Lunch" program.

On the basis of the instructor's reading of the Halloween story and the instructor's account of that story conveyed to the principal, DF was initially suspended for five school days. DF was then given notice that a "Superintendent's Hearing" as provided for under New York's *Education law* would be held to determine if DF should be subjected to further punishment, and DF was given notice that he was being accused of threatened use of a weapon and intimidation or threatening other students.

At the Superintendent's Hearing, no student testified as to being threatened by DF. However, written statements purportedly by other students in DF's English class were introduced into evidence without DF having an opportunity to review them prior to the hearing, and without DF or his parents being informed as to the identity of the students who provided the statements. These statements were utilized to demonstrate that other students felt intimidated or threatened by DF's story.

In addition, at the Superintendent's Hearing an additional charge of harassment was asserted against DF. The Superintendent's Hearing was conducted without any rules of procedure, and other hearsay evidence was permitted to be introduced. Finally, there were no requirements that the hearing officer be impartial.

The hearing officer found that DF's story was sufficient to find him guilty of engaging in threatening behavior, including the threatened use of weapons, and harassment. Based on the hearing officer's recommendation, DF was suspended for 30 days.

DF commenced this action alleging that DF's suspension violated the procedural and substantive due process requirements of the United States Constitution because DF was never given any notice he could be punished for the contents of his journal entry, and the hearing undertaken prior to the 30-day suspension was not fundamentally fair since, *inter alia*, anonymous written statements were utilized to find that DF engaged in threatening behavior. The Amended Complaint also asserted that DF's suspension for writing a fictional story in his personal journal violated his First Amendment rights because DF's story, only a small portion of which was read out loud to his English class, and was never read to anyone at the "Latin at Lunch" program, did not substantially interfere with the functioning of DF's school. Further, DF also asserted pendent jurisdiction state law claims.

The District Court had jurisdiction over the subject matter of plaintiff's claims pursuant to 28 U.S.C. §§1331, 1343 and 1367 in that the case arose under 42 U.S.C. §1983, New York State *Public Health Law* §2504 and New York State's common law. The District Court (Hon. Thomas C. Platt, J.), by its memorandum and order dated September 12, 2005, dismissed plaintiff's Amended Complaint in its entirety pursuant to Fed.R.Civ.P. 12(b)(6) determining, *inter alia*, that the procedures utilized to suspend DF complied with the Fourteenth Amendment's procedural due process requirements and that "the School's interest in protecting the identities of the students outweighed any interest in cross-examination of them [DF] may have had." The District Court also ruled that DF's story constituted a true threat and created a substantial risk of disrupting DF's school.

The United States Court of Appeals for the Second Circuit had appellate jurisdiction over plaintiff's appeal pursuant to 28 U.S.C. §1291 because plaintiff timely appealed from the judgment dated September 30, 2005, which dismissed the Amended Complaint in its entirety, by serving and filing a notice of appeal on October 26, 2005.

REASONS FOR GRANTING THE PETITION

I. THIS COURT HAS NOT DETERMINED WHAT CONSTITUTES "FUNDAMENTALLY FAIR PROCEDURES" IN THE CONTEXT OF A SCHOOL DISCIPLINARY PROCEEDING THAT RESULTS IN A SUSPENSION OF LONGER THAN 10 DAYS

In *Goss v. Lopez*, *supra*, this Court determined that a student has constitutionally protected property and liberty interests in a public school education, and that the suspension of a student from public school must comport with the Constitutional requirements of procedural due process. In *Goss*, the suspension was for 10 days, and this Court determined that some type of procedure must be undertaken prior to a suspension to assure that a student has engaged in the alleged wrongful conduct. This Court further explained that in the context of a short suspension – 10 days or less – the required procedures may consist of nothing more than giving the student notice of the charges against him, and if the student denies the charges, "an explanation of the evidence the authorities have and an opportunity to present his side of the story" (*Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 85 [1978]). However, in *Goss*, this Court cautioned that more formal procedures may be required if a suspension of greater than 10 days is at issue (*Goss*, 419 U.S. at 584).

Since *Goss* was decided over 30 years ago, this Court has not addressed whether more formal procedures are required in the context of a suspension that is longer than 10 days and, if so, what procedures are required.[1] As a result,

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[1] In *Wood v. Strickland*, 420 U.S. 308 (1975), the respondents argued that a procedural due process violation had occurred in a public school disciplinary proceeding, but this Court did not address the issue because neither the Court of Appeals nor did the District Court determine whether there had been a procedural due process violation. In *Carey v.*

the Circuit Courts of Appeals have addressed whether a procedural due process violation occurred within the context of school disciplinary proceedings resulting in suspensions for longer than 10 days without guidance from this Court, with varying results.

For example, in *Newsome v. Batavia Local School District*, 842 F.2d 920, 923-24 (6th Cir. 1988), the Sixth Circuit noted that the Supreme Court has "specifically left open the question of what process is due in longer term suspension (suspensions exceeding 10 days) and expulsion issues", and without the "aid of the Supreme Court authority directly on point", the Sixth Circuit resolved the due process issues it confronted "under the more general rubric of *Mathews v. Eldridge*...." The Sixth Circuit then held that although the plaintiff-student's procedural due process rights were violated when anonymous written statements from other students were considered although they had not been read at the suspension hearing, there would be no due process violation if these statements had been presented at the disciplinary hearing even though the plaintiff was not given an opportunity to cross-examine his accusers. The Sixth Circuit reasoned that in this "turbulent, sometimes violent, school atmosphere it is critically important that we protect the anonymity of students who 'blow the whistle' on their classmates who engage in drug trafficking and other serious offenses" (*Newsome v. Batavia Local School District*, *supra*, 842 F.2d at 925).

Similarly, in *Watson v. Beckel*, 242 F.3d 1237, 1240 (10th Cir. 2001), the Tenth Circuit also observed that "[t]he Supreme Court has not answered the question of what, if any, additional process is required for a long-term suspension or expulsion". The Tenth Circuit applied the

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Piphus, 435 U.S. 247 (1978), this Court held that damages were recoverable when a student was suspended in violation of procedural due process requirements even if the student's suspension was justified, but the respondents in *Carey* did not challenge the determination that there had been a procedural due process violation.

balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine what additional process may be due for a suspension longer than 10 days, and rejected the plaintiff-student's contention that the written notice of hearing was insufficient because it did not set forth the specific charges against the student, finding that the student had been given adequate oral notice as to the subject matter of the hearing (*see also Keough v. Tate County Board of Education*, 748 F.2d 1077 [5th Cir. 1984] [student's procedural due process rights not violated by the failure to provide the student with a list of witnesses and summary of testimony prior to a hearing which resulted in an expulsion]; *Brewer v. Austin Independent School District*, 779 F.2d 260 [5th Cir. 1985]).

Student suspensions in New York are governed by *Education Law* §3214. Pursuant to New York's *Education Law*, a "principal" suspension of up to five days may be imposed after the parents and the student are given an opportunity to meet with the principal prior to the suspension taking effect. For suspensions longer than 5 days, a "Superintendent's Hearing" must be conducted, and New York State law provides that a student can be represented by counsel, a record of the hearing must be maintained, and the student should be entitled to cross-examine witnesses (*Education Law* §3214[3][c][1]). New York State law does not set forth the particular procedures to be used in a Superintendent's Hearing, nor does it set forth any evidentiary rules that are required to be followed, nor does it require that the hearing officer be impartial.

At DF's Superintendent's Hearing, written statements by students were permitted into evidence to establish that DF's story constituted a threat because the reading of DF's story in his English class made other students uncomfortable. The written statements were not provided to DF prior to the hearing, nor were the students identified, and neither DF nor his representative was entitled to ask the students any questions with regard to their statements. Further, throughout the Superintendent's

Hearing, hearsay statements were routinely accepted for their truth, and no procedures or rules governing the conduct of the hearing were followed. As a result of the hearing, DF was suspended for 30 days.

Accordingly, this case squarely presents the issue as to whether formal evidentiary hearings are required for a public school suspension of greater than 10 days, the issue left open by this Court's ruling in *Goss*, and if so, does the utilization of anonymous written statements from other students to establish the charges comply with the procedural due process requirements of the Fourteenth Amendment. The determination of this issue by this Court would impact all of the public school districts within the United States and would give guidance as to the procedures that must be utilized in order to suspend a student for a lengthy period of time.

This Court has consistently held that the procedural due process that is required varies depending on the nature of the private interest involved, the risk of an erroneous deprivation through the procedures that are used, the probable value of additional or substitute procedures, and the burden upon a government caused by any additional substitute procedural requirements (*see, e.g., Zinermon v. Burch*, 494 U.S. 113 [1990]). In addition, this Court has firmly held that a student's right to an education is not so "insubstantial that suspensions may constitutionally be imposed by a procedure that the school chooses" (*Goss* at 576), and that a school district must adopt fundamentally fair procedures in order to suspend a student.

Here, permitting the use of anonymous written statements without providing DF any opportunity to refute what was said does not constitute a fundamentally fair procedure. This Court has held that when the notice of the interest at stake is substantial, an opportunity to challenge the evidence against an individual – including cross-examining witnesses – is an important aspect of procedural due process (*Goldberg v. Kelly*, 397 U.S. 254 [1970]).

Accordingly, this Court should address whether a lengthy suspension of a student form a public school involves such a substantial interest as to require an evidentiary hearing and the prohibition of anonymous written statements.[2] This issue was addressed in *Goss*, but expressly not decided, and this case presents this Court with the opportunity to make this determination and clarify the required due process for lengthy school suspensions.

II. THE DETERMINATION THAT DF'S STORY, IN AND OF ITSELF, CONSTITUTED A TRUE THREAT AND CREATED A RISK OF MATERIAL DISRUPTION UPON A MOTION TO DISMISS IS IN CONFLICT WITH THE HOLDINGS OF OTHER CIRCUITS AND THIS COURT

DF's First Amendment claims under this Court's holdings in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) were dismissed on a motion pursuant to Fed.R.Civ.P. 12(b)(6) based on a determination that DF's story, in and of itself, constituted a true threat and created a risk of material disruption at DF's school. DF was not given the opportunity to establish, by introducing evidence, that his "Halloween" story was not a threat and did not risk materially disrupting his school because he only included the names of students after asking their permission and only read the story at the request of other students.

When faced with student free speech issues, other Circuits have clearly set forth that a determination whether a student's statement or writing can be determined to be a true threat and not protected by the First Amendment, or that

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[2] Further, New York's *Education Law* is silent as to whether hearsay evidence may be admitted, what type of material should be used to determine the nature of the punishment, and whether the information to be used against a student must be provided to the student or his representative prior to the hearing.

punishing a student for protected speech is proper if there is a risk of material disruption, a Court must independently examine the factual record and the context in which the statements or writings were made (*compare Porter v. Ascension Parish School Board*, 393 F.3d 608 [5th Cir. 2004]; *Lavine v. Blaine School District*, 257 F.3d 981 [9th Cir. 2001]). By affirming the District Court's determination on a Fed.R.Civ.P. 12(b)(6) motion that DF's story constitutes a true threat and created a risk of material disruption, the Second Circuit departed from the standard of other circuits, and permitted such findings based only on the content of DF's story, ignoring the context in which it was written and read out loud.

Further, the Second Circuit, in the context of criminal law, has consistently held that determination of what constitutes a true threat must be undertaken in the factual context in which the writing or the statements are made (*see, e.g., U.S. v. Abdel Jabbor Malik*, 16 F.3d 45 [2d Cir. 1994]; *U.S. v. Kelmar*, 534 F.2d 1020 [2d Cir. 1976]). The Second Circuit's determination in this case suggests that the process to determine whether a writing or a statement in a school setting is a true threat is different than the process used to determine whether a statement constitutes a true threat undertaken in other circumstances. The rulings in this case suggest deference should be given to school personnel to determine what a true threat is, as opposed to the court undertaking its own factual analysis on a First Amendment claim.

Such rulings are in clear conflict with the holdings of this Court and other circuits that given the nature of the right of stake, a court must undertake its own factual analysis of a First Amendment claim (*see Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 [1995]; *Holley v. The Seminole County School District*, 755 F.2d 1492, 1501 [11th Cir. 1985] ["First Amendment claim[s], like other claims of substantive constitutional rights must be given *de novo* review in the district court"]).

The lower court holdings here suggest that First Amendment claims in a school setting do not require a court to undertake an independent factual examination, but that deference to the determination of school district personnel is appropriate. Such a departure from established law, and the isolation of First Amendment claims in a school setting for different procedural treatment, should be examined by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

E. Christopher Murray
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October 2006

APPENDIX

MANDATE

EDNY/C.I.
04-cv-4251
Hon. Orenstein
Hon. Platt

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA

At a stated term of the United States Court of Appeals for the Second Circuit, held at Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 9th day of May, two thousand and six.

PRESENT:

JOSÉ A. CABRANES
REENA RAGGI
Circuit Judge
RICHARD M. BERMAN
District Court *

UNITED STATES
COURT OF APPEALS
FILED MAY 9, 2006
ROSEANN B.
MACKECHNIE, CLERK

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D.F., by his Parent and Natural Guardian, ANDREW FINKLE,
Plaintiff-Appellant,

v.

No. 05-6234-CV

BOARD OF EDUCATION OF SYOSSET CENTRAL SCHOOL DISTRICT; JAMES KASSEBAUM, Both Individually and in His Capacity as Principal of the

HARRY B. THOMPSON MIDDLE SCHOOL; and CAROLE G. HANKIN, as Superintendent of the of the SYOSSET CENTRAL SCHOOL DISTRICT,

Defendants.

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* The Honorable Richard M. Berman, United States District Judge for the Southern District of New York, sitting by designation.

ISSUED AS MANDATE:
AUG -1 2006

APPEARING FOR APPELLANT	E. CHRISTOPHER MURRAY (LaDonna M. Lusher, *on the brief*), New York Civil Liberties Union Foundation, Garden City, N.Y.
APPEARING FOR APPELLEES	PETER J. BIGING, Lewis Brisbois Bisgaard & Smith LLP, New York, NY, *for the board of Education and Principal Kassebaum*
	JAMES M. WICKS (Steven N. Davi, *on the brief*), Farrell Fritz, P.C., Uniondale, NY for *Superintendent Hankin*

Appeal from a judgment of the United States District Court for the Eastern District of New York (Thomas C. Platt, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the

judgment of said District Court be and hereby is **AFFIRMED**.

Plaintiff "D.F.", through his father Andrew Finkle, appeals from a September 30, 200t judgment of the District Court dismissing all of his claims against all defendants on the basis of the the District Court's September 12, 2005 Memorandum and Order, 386 F. Supp. 2d 119 (E.D.N.Y. 2005).

We assume the parties' familiarity with the underlying facts and procedural history.

Substantially for the reasons stated in the thoughtful and comprehensive opinion of the District Court, we conclude that judgment for the defendants was appropriate for all claims.

We have carefully considered all of D.F.'s arguments and find them without merit. The judgment of the District Court is **AFFIRMED.**

FOR THE COURT,
Roseann B. MacKechnie, Clerk of Court

By: /s/ Lucille Carr

A TRUE COPY
Roseann B. MacKechnie
By: /s/ _____
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

D.F., by his Parent and Natural Guardian, ANDREW FINKLE,

Plaintiff,

- against -

BOARD OF EDUCATION OF SYOSSET CENTRAL SCHOOL DISTRICT; JAMES KASSEBAUM, Both Individually and in His Capacity as Principal of the HARRY B. THOMPSON MIDDLE SCHOOL; and CAROLE G. HANKIN, Both Individually and in Her Capacity as Superintendent of the SYOSSET CENTRAL SCHOOL DISTRICT,

Defendants.

Filed
In Clerk's Office
U.S. District
Court E.D.N.Y.
Sep 12 2005
Long Island Office
CV-04-4251

MEMORANDUM AND ORDER

----------X

PLATT, District Judge.

Before this Court is the Board of Education of Syosset Central School District ("Board of Education"), James Kassebaum ("Kassebaum"), and Carole G. Hankin's ("Hankin"), (collectively "Defendants"), motions to dismiss Plaintiff D.F.'s ("Plaintiff" or "D.F.") amended complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).[1] Defendants move to dismiss, claiming there has been no violation of: Plaintiff's right to freedom of speech under the First Amendment, Plaintiff's right to procedural or substantive due process under the Fifth and Fourteenth

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[1] Defendant Hankin moves separately from the Board of Education and Kassebaum, however the only individualized claim is the defamation claim against Kassebaum.

Amendments, Plaintiff's right to equal protection under the Fifth and Fourteenth Amendments, Plaintiff's right to be free from unreasonable search and seizure under the Fourth Amendment, Plaintiff's rights under New York Public Health Law § 2504, or Plaintiff's rights under the New York State Constitution. Defendants also move on the ground that a suit for damages under 42 U.S.C. § 1983 is barred by the Eleventh Amendment, and that they are protected by qualified immunity. Defendant Kassebaum joins in the Defendants' motion and additionally moves to dismiss the defamation claim against him.

For the following reasons, Defendants' motion to dismiss is GRANTED as to all of Plaintiff's claims.

Factual Background

Plaintiff D.F. is a 12 year-old boy who brings this suit by his parent and guardian, Andrew Finkle. The case arises from the following events. At the start of the 2003-2004 school year, Philip Kaiser ("Kaiser"), Plaintiff's English teacher, assigned his sixth grade students to keep a long-term journal "expressing thoughts, concerns, or feelings." (Am. Compl. ¶ 9) Kaiser told the students that they could utilize such forums as poems or short stories. (Am. Compl. ¶ 10) As part of his journal assignment, Plaintiff wrote the fictional story entitled, "Costume Party," which he says is modeled after the horror movie *Halloween.* (Def. Hankin's Mem. Dis. at 2) The story involved a boy named "Dylan," a horror movie fan who was bullied by other children at school and desired revenge. (Def. Hankin's Ex. B) In the third chapter of the story, Dylan, wearing a costume similar to that worn by the villain in *Halloween,* stabs a boy named "Matt Cohen" (described as a "mean kid") in the head. (Id.) Dylan then goes on a killing spree, stabbing other "bad kids." (Id.) At one point in the story a female student is described kissing a boy with her shirt off. (Id.) Dylan later walks in on this same girl while she is engaging in intercourse with another student, and chops off the girl's head with an axe. (Id.) Some of the characters in the story

were named after actual students with whom Plaintiff went to school. (Am. Compl. ¶ 15) Plaintiff had no prior disciplinary record at the time of writing the story. (Am. Compl. ¶ 16)

On October 3, 2003, Kaiser arrived late to class and found Plaintiff reading the story to the other students in the class. (Am. Compl. ¶ 17) Kaiser first asked Plaintiff to sit down, but then allowed him to continue reading the story because he was preoccupied with checking attendance. (Id.) The same day, while Plaintiff was at a voluntary program called "Latin at Lunch," Plaintiff asked permission to read his story to the other approximately sixteen (16) students present. (Am. Compl. ¶ 21) The instructor, Ms. St. Johns ("St. Johns"), requested that she read the story to herself first. (Def. Hankin's Mem. Dis. at 3) St. Johns was disturbed by the story, and brought the story to Principal Kassebaum. (Id.) Kassebaum then suspended Plaintiff for five (5) days (Am. Compl. ¶ 26) and sent a notice to Plaintiff's parents informing them of the dates of the suspension. (Am. Compl. ¶ 28) The day before the suspension was to begin, however, Plaintiff was not allowed to attend his classes. (Am. Compl. ¶ 29) Also, at the direction of the School District and Kassebaum, a school psychiatrist performed a number of psychological tests on Plaintiff. (Id.) Plaintiff's parents were neither informed of nor given the opportunity to consent to the psychological testing. (Am. Compl. ¶ 30) According to the complaint, on October 8, 2003, Kassebaum communicated with the parents of two (2) other students and told them that Plaintiff had engaged in "threatening behavior" towards their children and "harassment of a deviant sexual nature." (Am. Compl. ¶ 32)

On October 21, 2003, after the five-day suspension, a Superintendent's hearing was held. (Am. Compl. ¶ 37) At the hearing, the School District alleged three (3) violations of the School District's Code of Conduct: (i) threatening the use of a weapon, (ii) harassment, and (iii) intent to intimidate or threaten other students. (Id.) Plaintiff's parents were informed beforehand that a Superintendent's Hearing would be held.

(Am. Compl. ¶ 35) According to the complaint, Plaintiff's parents had notice of all of the charges except for the harassment charge. (Am. Compl. ¶ 37) The School District chose Sharon Berlin, Esq. ("Berlin") as the Hearing Officer. (Am. Compl. ¶ 38) Berlin was an attorney with Rains & Pogrebin, P.C., a firm routinely hired by the School District. (Am. Compl. ¶ 39)

At the hearing, no students testified to being threatened or harassed by Plaintiff. (Am. Compl. ¶ 47) However, the School District introduced–over the objection of Plaintiff's attorney–statements from students describing their reaction to Plaintiff's story. (Am Compl. ¶ 50) The students who made the proffered statements were never identified and Plaintiff's attorney was never permitted to question these students. (Am. Compl. ¶ 51) Kaiser, St. Johns, Kassebaum, Ms. Grenzig, the Assistant Principal, and Plaintiff's parents all testified at the hearing. (Def. Hankin's Mem. Dis. at 4) Berlin concluded that Plaintiff's "story was designed to place individuals in fear of bodily harm" and Plaintiff, through his story, was guilty of "threatened use and/or contemplated use of a weapon in violation of the Code of Conduct." (Def. Hankin's Ex. D at 200-202) Berlin recommended sustaining all three (3) charges brought against Plaintiff and that Plaintiff be suspended from school for thirty (30) days. (Am. Compl. ¶ 54) Hankin followed the recommendation and subsequently suspended Plaintiff for thirty days. (Am. Compl. ¶ 59)

Plaintiff alleges violations of his First, Fourth, Fifth, and Fourteenth Amendment rights. Plaintiff also brings claims for violation of New York Public Health Law § 2504, and the Constitution of the State of New York. Plaintiff brings a State law claim for defamation against Defendant Kassebaum. Lastly, Plaintiff brings a claim for damages under 42 U.S.C. § 1983.

Procedural Background

Plaintiff appealed the thirty-day suspension by letter to the School Board, dated October 28, 2003. The School Board

denied the appeal. Plaintiff then appealed the decision to the Commissioner of Education, who also denied the appeal. On October 1, 2004, Plaintiff filed a complaint in this court and on March 3, 2005 filed an amended complaint. On July 18, 2005, Defendants filed a motion to dismiss the amended complaint. Oral argument was heard on the motion on July 28, 2005, and decision was reserved.

Discussion

"A dismissal under Rule 12(b)(6) is a dismissal on the merits of the action–a determination that the facts alleged in the complaint fail to state a claim upon which relief can be granted." Nowack v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1187 (2d cir. 1996). A district court should deny a motion to dismiss for failure to state a claim under 12(b)(6) "unless it appears to a certainty that a plaintiff can prove no set of facts entitling him to relief." Ryder Energy Distrib. Corp. v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984) (citing Cloney v. Gibson, 355 U.S. 41, 45-56 (1957)). The Court must confine itself to a consideration of the facts that appear on the face of the complaint. Ryder, 748 F.2d at 779.

The Court may dismiss the complaint for lack of subject matter jurisdiction under 12(b)(1) if it lacks the statutory or constitutional power to adjudicate the case. Nowack, 81 F.3d at 1187. The standards for dismissal under 12(b)(6) and 12(b)(1) are virtually identical. Lerner v. Fleet Bank, N.A., 318 F.3d 113, 128 (2d Cir. 2003) (citing Moore v. Painewebber, Inc., 189 F.3d 165, 178-179 (2d Cir. 1999)). The only practical distinction is that "the party invoking the jurisdiction of the court has the burden of proof in a 12(b)(1) motion, in contrast to a 12(b)(6) motion, in which the defendant has the burden of proof." Lerner, 318 F.3d at 128 (citing Thompson v. County of Franklin, 15 F.3d 245, 248 (2d Cir. 1994)).

The defamation claim against Kassebaum is the only claim that is specific to any single Defendant. Therefore, the analysis of all the other claims applies to all Defendants.

I. First and Fourteenth Amendment Freedom of Speech Claim

Plaintiff alleges that his First Amendment right to freedom of speech was violated when he was suspended solely because Defendants disagreed with the content of his journal. Freedom of speech, however, is not an unfettered right for any U.S. citizen. Speech that constitutes a true threat of violence, by being a "serious expression of an intent to cause present or future harm," may be prohibited. Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 616 (5th Cir. 2004). The speaker of a true threat does not even need to have the intention of carrying out the threat. Virginia v. Black, 538 U.S. 343, 359-360 (2003). The prohibition on true threats is meant to "protect individuals from the fear of violence, the disruption that fear engenders, and the possibility that the threatened violence will occur." R. A. V. v. St. Paul, 505 U.S. 377, 388 (1992). "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic." Schenck v. United States, 249 U.S. 47, 52 (1919). Moreover, a student like Plaintiff possesses even less free speech rights. It is well established that school administrators have the right to prohibit speech that "materially or substantially interferes with the requirements of appropriate discipline in the operation of the school," or that "would substantially interfere with the work of the school or impinge upon the rights of other students." Smith v. Mount Pleasant Pub. Sch., 285 F. Supp. 2d 987, 993 (E.D. Mich. 2003); Tinker v. Des Moines Indep. Comty. Sch. Dist., 393 U.S. 503, 509 (1969). In addition, a school may prohibit student speech that is inconsistent with its "basic education mission," even though the same speech may not be prohibited outside the school. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986). Speech that is vulgar or school-sponsored (where a listener would assume that the writing or statements are made on behalf of the school) may also be restricted. Smith, 285

F.Supp. 2d at 994; Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

In this case, Plaintiff's story is speech that would not be protected in the school setting. Plaintiff, as a minor and a student, is not entitled to unbridled First Amendment protection in the school setting. Bethel Sch. Dist., 478 U.S. at 685. The story, with its graphic depictions of the murder of specifically named students and sex between named students, may materially interfere with the work of the school by disturbing the students and teachers. For example, at one point in the story, the murderer kicks a girl named "Shanna" in the mouth and Shanna responds by kissing the murderer while blood is "pouring out of her mouth." (Def. Hankin's Ex. B) Further, the story constitutes a true threat of violence as it describes a student killing other real-life students. This Court is well aware of the legacy of fear and panic that recent acts of devastating school violence have wrought in this country. Schools must be able to protect their student bodies against such acts and be able to provide a modicum of security for their parents and students. Consequently, Plaintiff's story is not entitled to First Amendment protection, and thus the motion for dismissal as to the freedom of speech claim is granted.

II. Due Process Claims

A. Procedural Due Process Violation

Plaintiff's claim of procedural due process is primarily based on three (3) allegations: (i) he received no notice of the harassment charge prior to the Superintendent's Hearing, (ii) the Hearing Officer was biased, and (iii) Plaintiff's attorney was prevented from cross-examining witnesses at the hearing. An analysis of whether procedural due process has been afforded generally involves consideration of the following three factors: "(i) the private interest that will be affected by the official action, (ii) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and (iii) the Government's interest, including the function involved

and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." Mathews v. Eldridge, 424 U.S. 319, 335 (1976). As to the first factor, a student has a constitutionally protected property interest in education, "which may not be taken away for misconduct without adherence to the minimum procedures required by [the Due Process] Clause." Gross v. Lopez, 419 U.S. 565, 574 (1975).

This Court is mindful, however, that in school disciplinary hearings, "students are not entitled to the procedural protections of a criminal trial." Board of Educ. of Monticello Cent. Sch. Dist. v. Commr. of Educ., 91 N.Y.2d 133, 139-40 (N.Y. 1997). Rather, New York Education law provides for certain, basic procedural protections for suspensions longer than five (5) days such that the "pupil and the person in parental relation to such pupil shall have had an opportunity for a fair hearing, upon reasonable notice, at which time such pupil shall have the right to representation by counsel, with the right to question witnesses against such pupil and to present witnesses and other evidence on his behalf..." N.Y. Educ. Law § 3214(3)(c) (McKinney 2005). Other than these broad parameters, New York Education Law § 3214 does not specify the manner in which the hearing must be conducted.

Here, Plaintiff alleges that he received no notice of the harassment charge prior to the hearing. According to the New York Court of Appeals, a student is entitled to advance notice of the charges that will be levied against him or her at the suspension hearing, "sufficiently specific to advise the student and his counsel of the activities or incidents which...will form the basis for the hearing." Board of Educ. of Monticello Cent. Sch. Dist., 91 N.Y.2d at 140. The notice that Plaintiff received, however, is sufficiently specific so as to advise him of the charges that form the basis of the hearing. Plaintiff was informed of two of the three charges lodged against him and he was aware of the underlying activity–the story he wrote–from

which the charges arose. Thus, there was no risk of erroneous deprivation of Plaintiff's interest in education through the notice given, and there would be little or no probable value of any additional notice.

Plaintiff also alleges that Berlin, the Hearing Officer, was biased because she worked for a firm that was routinely hired by the School District. This allegation does not constitute a cognizable deprivation of due process because New York education law grants the superintendent the authority to appoint the hearing officer. N.Y. Educ. Law § 3214(3)(c). Plaintiff's final allegation is that the hearing was not procedurally proper because his counsel was not permitted to interview the students who provided written statements. It is true that New York Education law provides Plaintiff with the "right to question witnesses against [him] and to present witnesses and other evidence on his behalf." N.Y. Educ. Law § 3214(3)(c). In this case, however, the School's interest in protecting the identities of the students outweighed any interest in cross-examination of them the Plaintiff may have had. Overall, Plaintiff was afforded the procedural protections to satisfy his due process rights; he was given a hearing, given sufficient notice of the hearing, and permitted to present a defense of his behavior with counsel. He offered his own parents to testify on his behalf. On the other side of the balance sheet, the School District had a keen interest in keeping the identity of the students confidential. The School District reasonably considered Plaintiff to be potentially violent, and by not disclosing the names of the students the School District was protecting them from possible retaliation by Plaintiff. Thus, on balance, the motion for dismissal as to the claim of procedural due process violation is granted.

B. Substantive Due process Violation

Plaintiff's claim of substantive due process is based on allegations that the thirty (30) day suspension was excessive and arbitrary and capricious. The right to due process may be violated substantively, regardless of procedural fairness.

County of Sacramento v. Lewis, 523 U.S. 833, 840 (1998). "Substantive due process protects against governmental action that is arbitrary, conscience shocking, or oppressive in a constitutional sense, but not against governmental action that is 'incorrect or ill-advised.'" Lowrance v. Achtyl, 20 F.3d 529, 537 (2d Cir. 1994) (quoting Bishop v. Wood, 426 U.S. 341, 350 (1994)). "Only the most egregious official conduct can be said to be arbitrary in the constitutional sense." County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) (quoting Collins v. Harker Heights, 503 U.S. 115, 129 (1992)). "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." Epperson v. Arkansas, 393 U.S. 97, 104 (1968). The Supreme Court has "repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conductin the schools." Tinker, 393 U.S. at 507.

Plaintiff's claim that the thirty-day suspension violated substantive due process because it was excessive and arbitrary and capricious is without merit. The decision to suspend Plaintiff for thirty (30) days was within the Defendants' discretion. Plaintiff wrote a story that depicted a student stabbing his classmates to death, and this conduct clearly warranted serious disciplinary action. A suspension for thirty days is not so egregious as to warrant this Court's intervention in the School's affairs. A student might easily miss thirty days of school as the result of illness. Thus, the motion to dismiss the substantive due process claim is granted.

III. Equal Protection Claim

Plaintiff claims violation of his right to Equal Protection based on allegations that he was selectively-treated compared to other students. In a claim for selective enforcement, the Plaintiff must allege that "(i) compared with others similarly situated, was selectively treated; and (ii) that

such selective treatment was based on impermissible considerations, such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." Diesel v. Town of Lewisboro, 232 F.3d 92, 103 (2d Cir. 2000). Conclusory allegations of selective treatment may not survive a motion for dismissal. Albert v. Carovano, 851 F.2d 561, 572, 573-74 (2d Cir. 1988)). In order to state a claim for selective enforcement, the Plaintiff must specify instances in which he was "'singled...out for unlawful oppression.'" Id. (quoting Birnbaum v. Trussell, 347 F.2d 86, 90 (2d Cir. 1965)).

In support of his selective treatment claim, Plaintiff alleges that "upon information and belief, other students attending middle school within the School District who engaged in similar or more severe conduct, including actual threats of violence, received suspensions of a lesser duration than D.F.'s." (Am. Compl. ¶ 60) Plaintiff, however, fails to identify any similarly situated individual, or any set of facts in support of his allegations of disparate treatment. Plaintiff's allegations of selective treatment are wholly conclusory, and such conclusory allegations of selective treatment are insufficient to defeat a motion to dismiss. Albert, 851 F.2d at 572, 573-74. The motion for dismissal as to the claim for selective treatment is granted.

IV. Fourth Amendment Unreasonable Search and Seizure Claim

Plaintiff alleges that subjecting Plaintiff to psychological testing without his parents' consent violated Plaintiff's rights under the Fourth and Fourteenth Amendments of the United States Constitution. The Fourth Amendment prohibition of unreasonable searches and seizures "applies to governmental action," and "activities of sovereign authority." Burdeau v. McDowell, 256 U.S. 465, 475 (1921). School officials, however, are allowed greater latitude in their searches of students. New Jersey v. T.L.O., 469 U.S. 325, 340 (1985). A search is justified when there are "reasonable grounds for

suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." Id. at 341-42. This standard honors the viable interest that educators have in 'maintaining security and order' in their schools. Id. at 340.

Defendants, as school officials, are under a lesser degree of scrutiny in connection with the search and seizure of students. New Jersey, 469 U.S. at 340; Wofford v. Evans, 390 F.3d 318, 326 (4th Cir. 2004). Defendants were justified under the Fourth and Fourteenth amendments in testing Plaintiff. Plaintiff's story, with its graphic depictions of a child brutally murdering his classmates, gave Defendants reasonable grounds for fearing that Plaintiff might carry out the acts he described. Defendants acted within the discretion granted them by the Fourth and Fourteenth Amendments in testing Plaintiff because it was reasonable to believe that he was capable of violent acts toward his fellow students. Thus, the motion to dismiss the claim for violation of the Fourth Amendment based on the psychological testing is granted.

V. New York Public Health law § 2504 Claim

Plaintiff alleges that subjecting him to psychological testing without his parents' consent also violated New York Public Health Law § 2504. Under New York law, parental consent is required for the administering of "medical, dental, health and hospital services" to a child. Alfonso v. Fernandez, 195 A.D.2d 46, 51 (N.Y. App. Div. 1993). Section 2504, however, carves out a few limited exceptions to the parental consent rule–none of which the Plaintiff fits. N.Y. Pub. Health Law § 2504 (2005) (dispensing with parental consent requirement for persons over eighteen years of age, who have married or borne a child, who are pregnant, or in the case of a medical emergency).

Defendants concede that psychological testing was administered to Plaintiff without his parents' consent, but they argue that the psychological testing was not a "health service" within the meaning of the statute and the School was not

obligated to receive parental consent. (Defs. Bd. of Educ. and Kassebaum's Mem. Dis. at 21) The statutory definition of "health service" contradicts the Defendants' argument, however, because it includes "procedures designed to determine the health status of the child." 8 NYCRR § 136.1(d) (2005). The psychological testing was administered by the school psychiatrist, and was for the purpose of determining Plaintiff's mental health, or "psychological state" as Defendants refer to it. (Defs. Bd. of Educ. and Kassebaum's Mem. Dis. at 21) The psychological testing performed on Plaintiff without his parents' consent thus falls within the realm of a "health service." Plaintiff alleges facts sufficient to state a claim for relief for violation of New York Public Health Law § 2504 as he was subjected to the psychological testing without the consent of his parents.

However, the motion to dismiss the claim for violation of New York Public Health Law § 2504 is ultimately granted due to qualified immunity, discussed below.

VI. Violation of New York State's Constitution

Plaintiff alleges that "Defendants' conduct violated rights secured by the Constitution of the State of New York." (Am. Compl. ¶ 90) This one sentence constitutes the entire sum and substance of Plaintiff's claim for violation of the New York constitution. Plaintiff fails to allege violations of any specific provisions of the Constitution of the State of New York, in either the Amended Complaint or in other Court submissions. Thus, the claim for violation of rights under the Constitution of the State of New York is insufficiently pled and the motion to dismiss is granted as to this claim without prejudice to re-plead.

VII. The Defamation Claim against Kassebaum

Plaintiff alleges that Defendant Kassebaum made false and defamatory statements about Plaintiff. In particular, Plaintiff points to Principal Kassebaum's statements to parents of students named in the story that Plaintiff had engaged in "threatening behavior" and "harassment of a deviant sexual

nature." A defamation claim directed at spoken words is a claim for slander. Albert v. Loksen, 239 F.3d 256, 265 (2d Cir. 2001). To prove slander under New York law, Plaintiff must show (i) a defamatory statement of fact, (ii) that is false, (iii) published to a third party, (iv) 'of and concerning' the plaintiff, (v) made with the applicable level of fault on the part of the speaker, (vi) either causing special harm or constituting slander per se, and (vii) not protected by privilege. Id. at 265-266. Qualified privilege is a defense to a defamation claim. Boyd v. Nationwide Mutual Insurance Co.,208 F.3d 406, 409 (2d Cir. 2000). "Good faith communications of a party having an interest in the subject, or a moral or societal duty to speak, are protected by a qualified privilege if made to a party having a corresponding interest or duty." Id. at 409-410 (quoting Zeevi v. Union Bank of Switzerland, 1993 U.S. Dist. LEXIS 5760, at *6 (S.D.N.Y. 1993).

Kassebaum's statements, that Plaintiff engaged in "threatening behavior" and "harassment of a deviant sexual nature," are certainly truthful in regards to those students whose names appear in the story. Plaintiff depicted his classmates being brutally murdered and participating in sexual acts with one another. The students whose names were used in these depictions were clearly the subjects of "threatening behavior" and "harassment of a deviant sexual nature." Further, Kassebaum is protected by qualified privilege. Kassebaum, as principal, had a duty to speak to the parents of the children whose names appeared in the story, given the threatening and harassing nature of the story. Thus, the motion for dismissal is granted as to Plaintiff's defamation claim against Kassebaum.

VIII. Violation of § 1983

Plaintiff brings a claim for damages under 42 U.S.C. § 1983 based on the alleged violations of his constitutional rights. In order to state a claim for violation of 42 U.S.C. § 1983, (1) the conduct complained of must have been committed by a person acting under color of state law; and (2) the conduct complained of must have deprived a person of

rights, privileges, or immunities secured by the Constitution or laws of the United States. Pitchell v. Callan, 13 F.3d 545, 547 (2d Cir. 1994). A motion to dismiss for failure to state a claim turns on whether plaintiff has adequately alleged constitutional violations actionable under § 1983. Hill v. City of New York, 45 F.3d 653, 664 (2d Cir. 1995).

"The Eleventh Amendment bars suit in federal court against a state official in his official capacity where the claim is that the official violated state law in carrying out his duties, and the relief sought would operate against the state." Takeall v. Ambach, 609 F. Supp. 81, 84 (S.D.N.Y. 1985); Pennhurst State School & Hosp. v. Halderman, 465 U.S. 891 (1984). "There is no cause of action for damages under 42 U.S.C. § 1983 against a school board or its members in their official capacities." Seils v. Rochester City School District, 192 F. Supp. 2d 100, 122 (W.D.N.Y. 2002), aff'd, No. 02-7222, 2004 WL 1258980 (2d Cir. Jun. 9, 2004), cert. denied, No. 04-807, 2005WL 637214 (March 21, 2005).

As previously stated, Plaintiff has failed to plead violations of the First, Fourth, Fifth, and Fourteenth Amendments, the New York Constitution, or a claim for defamation. Thus, as to these claims, the motion for dismissal of the claim for damages under 42 U.S.C. § 1983 is granted. Plaintiff does, however, state a cause of action for violation of New York Public Health Law § 2504. Nonetheless, the Eleventh Amendment prevents the School Board and Kassebaum and Hankin (acting in their official capacities) from being sued for damages under 42 U.S.C. § 1983. The Eleventh Amendment would not bar a suit for damages for example against Kassebaum and Hankin, individually, however, all of the actions that are the subject of the complaint were performed by Kassebaum and Hankin in their official capacities. Thus, the Eleventh Amendment bars a suit for damages under 42 U.S.C. § 1983 against Kassebaum and Hankin for violation of New York Public Health Law § 2504. The Eleventh Amendment does not bar a suit for liability under

42 U.S.C. § 1983, and thus the claim under New York Public Health Law § 2504 survives as to liability only.

The motion to dismiss the claim for damages under 42 U.S.C. § 1983 is granted as to all other claims.

IX. Qualified Immunity

Defendants argue that even if their actions violated Plaintiff's Constitutional or State law rights, Defendants are protected from liability by qualified immunity. The doctrine of qualified immunity shields school officials from liability for damages where "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). "A right is considered to be 'clearly established' if the 'contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" Danahy v. Buscaglia, 134 F.3d 1185, 1190 (2d Cir. 1988) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987).

An analysis of whether Defendants Kassebaum and Hankin are entitled to qualified immunity for the First, Fourth, Fifth, Fourteenth Amendment, New York State Constitution, and defamation claims is unnecessary, as the motion for dismissal of these claims is granted.

The only remaining question is whether Kassebaum and Hankin are entitled to qualified immunity as to the New York Public Health Law § 2504 claim. As previously stated, Plaintiff states a cause of action for violation of § 2504. The issue turns on whether Plaintiff's right to be free from psychological testing without his parents' consent is a clearly established statutory right. The contours of that right do not appear to be sufficiently clear. A reasonable official could fail to understand that subjecting Plaintiff to psychological testing without his parents' consent violates Plaintiff's statutory right. Defendants stated that the psychological testing was meant to determine Plaintiff's "psychological state." Such testing technically falls under the statutory definition of health services, as a

"procedure designed to determine health status." 8 NYCRR § 136.1(d) (2005). It is doubtful, however, that reasonable school officials are aware that psychological testing technically falls under the statutory definition of health services, as it appears in 8 NYCRR § 136.1(d) (2005). Thus, Defendants Kassebaum and Hankin are entitled to qualified immunity for violation of Plaintiff's right under § 2504, as this is not a clearly defined right of which a reasonable person would have known.

Finally, a comment in line with the Supreme Court's statements in Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986). This Court should not be a haven for complaints by students and their parents against actions taken by school officials in their extremely difficult task of educating and controlling the irresponsible behavior of their students. As is often the case, as it is here, these types of conflicts are better handled within the educational system and not in the federal trial and appellate courts.

Conclusion

For the foregoing reasons, the motion for dismissal is **GRANTED** as to all claims.

SO ORDERED.

/s/

Thomas C. Platt, U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

D.F., by his Parent and Natural Guardian, ANDREW FINKLE,

Plaintiff,

- against -

BOARD OF EDUCATION OF SYOSSET CENTRAL SCHOOL DISTRICT; JAMES KASSEBAUM, Both Individually and in His Capacity as Principal of the HARRY B. THOMPSON MIDDLE SCHOOL; and CAROLE G. HANKIN, Both Individually and in Her Capacity as Superintendent of the of the SYOSSET CENTRAL SCHOOL DISTRICT,

Defendants.

----------X

JUDGMENT

CV 04 4251 (TCP)

A Memorandum and Order of Honorable Thomas C. Platt, United States District Judge, having been filed on September 12, 2005, granting defendants' motion to dismiss plaintiff's amended complaint pursuant to Rule 12(b)(1) and 12(b)(6), it is

ORDERED AND ADJUDGED that plaintiff take nothing of defendants; and that plaintiff's amended complaint is hereby dismissed.

Dated: Central Islip, New York
September 30, 2005

ROBERT C. HEINEMANN
CLERK OF THE COURT

By: S/S LORRAINE SAPIENZA

APP 0023

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

UNITED STATES
COURT OF APPEALS
FILED JUL 21, 2006
Roseann B. MacKechnie
SECOND CIRCUIT

Date:	
Docket Number:	05-6234-cv
Short Title:	Finkle v. Board of Education of Syosset Central School Di
DC Docket Number:	04-cv-4252
DC:	EDNY (CENTRAL ISLIP)
DC Judge:	Honorable Thomas Platt Honorable James Orenstein

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the day of July two thousand six.

D.F., by his Parent and Natural Guardian, Andrew Finkle,

Plaintiff-Appellant,

v.

Board of Education of Syosset Central School District, James Kassebaum, both individually and in his

capacity as principal of the Harry B. Thompson Middle School and Carole G. Hankin, both individually and in her capacity as superintendent of the Syosset Central School District

A petition for panel rehearing and a petition for rehearing en banc having been filed by the appellant D.F., by his parent and natural guardian, Andrew Finkle. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a note be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk
By: /s/_____
Motion Staff Attorney

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION
AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION
AMENDMENT XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age,* and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.
No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.
Section 4.
The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.
Section 5.
The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
*Changed by section 1 of the 26th amendment.

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21. CIVIL RIGHTS GENERALLY
42 USCS § 1983

§ 1983. Civil action for deprivation of rights
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law,

suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

FEDERAL RULES OF CIVIL PROCEDURE
III. PLEADINGS AND MOTIONS
USC FED.R.CIV. PROC R. 12

How Presented. (b) Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

NEW YORK STATE EDUCATION LAW §3214

§ 3214. Student placement, suspensions and transfers.

* * *

1. School delinquent. A minor under seventeen years of age, required by any of the provisions of part one of this article to attend upon instruction, who is an habitual truant from such instruction or is irregular in such attend. .e or insubordinate or disorderly or disruptive or violent during such attendance, is a school delinquent.

2. Special day schools. The school authorities of any city or school district may establish schools or set apart rooms in public school buildings for the instruction of school delinquents, and fix the number of days per week and the hours per day of required attendance, which shall not be less than is required of minors attending the full time day schools.

2-a. a. Violent pupil. For the purposes of this section, a violent pupil is an elementary or secondary student under twenty-one years of age who:

(1) commits an act of violence upon a teacher, administrator or other school employee;

(2) commits, while on school district property, an act of violence upon another student or any other person lawfully upon said property;

(3) possesses, while on school district property, a gun, knife, explosive or incendiary bomb, or other dangerous instrument capable of causing physical injury or death;

(4) displays, while on school district property, what appears to be a gun, knife, explosive or incendiary bomb or other dangerous instrument capable of causing death or physical injury;

(5) threatens, while on school district property, to use any instrument that appears capable of causing physical injury or death;

(6) knowingly and intentionally damages or destroys the personal property of a teacher, administrator, other school

district employee or any person lawfully upon school district property; or

(7) knowingly and intentionally damages or destroys school district property.

b. Disruptive pupil. For the purposes of this section, a disruptive pupil is an elementary or secondary student under twenty-one years of age who is substantially disruptive of the educational process or substantially interferes with the teacher's authority over the classroom.

3. Suspension of a pupil. a. The board of education, board of trustees or sole trustee, the superintendent of schools, district superintendent of schools or principal of a school may suspend the following pupils from required attendance upon instruction: A pupil who is insubordinate or disorderly or violent or disruptive, or whose conduct otherwise endangers the safety, morals, health or welfare of others.

b. (1) The board of education, board of trustees, or sole trustee, superintendent of schools, district superintendent of schools and the principal of the school where the pupil attends shall have the power to suspend a pupil for a period not to exceed five school days. In the case of such a suspension, the suspending authority shall provide the pupil with notice of the charged misconduct. If the pupil denies the misconduct, the suspending authority shall provide an explanation of the basis for the suspension. The pupil and the person in parental relation to the pupil shall, on request, be given an opportunity for an informal conference with the principal at which the pupil and/or person in parental relation shall be authorized to present the pupil's version of the event and to ask questions of the complaining witnesses. The aforesaid notice and opportunity for an informal conference shall take place prior to suspension of the pupil unless the pupil's presence in the school poses a continuing danger to persons or property or an ongoing threat of disruption to the academic process, in which case the pupil's notice and opportunity for an informal conference shall take

place as soon after the suspension as is reasonably practicable.

(2) A teacher shall immediately report and refer a violent pupil to the principal or superintendent for a violation of the code of conduct and a minimum suspension period pursuant to section twenty-eight hundred one of this chapter.

c. (1) No pupil may be suspended for a period in excess of five school days unless such pupil and the person in parental relation to such pupil shall have had an opportunity for a fair hearing, upon reasonable notice, at which such pupil shall have the right of representation by counsel, with the right to question witnesses against such pupil and to present witnesses and other evidence on his behalf. Where a pupil has been suspended in accordance with this subdivision by a superintendent of schools, district superintendent of schools, or community superintendent, the superintendent shall personally hear and determine the proceeding or may, in his discretion, designate a hearing officer to conduct the hearing. The hearing officer shall be authorized to administer oaths and to issue subpoenas in conjunction with the proceeding before him. A record of the hearing shall be maintained, but no stenographic transcript shall be required and a tape recording shall be deemed a satisfactory record. The hearing officer shall make findings of fact and recommendations as to the appropriate measure of discipline to the superintendent. The report of the hearing officer shall be advisory only, and the superintendent may accept all or any part thereof. An appeal will lie from the decision of the superintendent to the board of education who shall make its decision solely upon the record before it. The board may adopt in whole or in part the decision of the superintendent of schools. Where the basis for the suspension is, in whole or in part, the possession on school grounds or school property by the student of any firearm, rifle, shotgun, dagger, dangerous knife, dirk, razor, stiletto or any of the weapons, instruments or appliances specified in subdivision one of section 265.01 of the penal law, the hearing officer or

superintendent shall not be barred from considering the admissibility of such weapon, instrument or appliance as evidence, notwithstanding a determination by a court in a criminal or juvenile delinquency proceeding that the recovery of such weapon, instrument or appliance was the result of an unlawful search or seizure.

(2) Where a pupil has been suspended in accordance with this section by a board of education, the board may in its discretion hear and determine the proceeding or appoint a hearing officer who shall have the same powers and duties with respect to the board that a hearing officer has with respect to a superintendent where the suspension was ordered by him. The findings and recommendations of the hearing officer conducting the proceeding shall be advisory and subject to final action by the board of education, each member of which shall before voting review the testimony and acquaint himself with the evidence in the case. The board may reject, confirm or modify the conclusions of the hearing officer.

d. (1) Consistent with the federal gun-free schools act, any public school pupil who is determined under this subdivision to have brought a firearm to or possessed a firearm at a public school shall be suspended for a period of not less than one calendar year and any nonpublic school pupil participating in a program operated by a public school district using funds from the elementary and secondary education act of nineteen hundred sixty-five who is determined under this subdivision to have brought a firearm to or possessed a firearm at a public school or other premises used by the school district to provide such programs shall be suspended for a period of not less than one calendar year from participation in such program. The procedures of this subdivision shall apply to such a suspension of a nonpublic school pupil. A superintendent of schools, district superintendent of schools or community superintendent shall have the authority to modify this suspension requirement for each student on a case-by-case basis. The determination of a

superintendent shall be subject to review by the board of education pursuant to paragraph c of this subdivision and the commissioner pursuant to section three hundred ten of this chapter. Nothing in this subdivision shall be deemed to authorize the suspension of a student with a disability in violation of the individuals with disabilities education act or article eighty-nine of this chapter. A superintendent shall refer the pupil under the age of sixteen who has been determined to have brought a weapon or firearm to school in violation of this subdivision to a presentment agency for a juvenile delinquency proceeding consistent with article three of the family court act except a student fourteen or fifteen years of age who qualifies for juvenile offender status under subdivision forty-two of section 1.20 of the criminal procedure law. A superintendent shall refer any pupil sixteen years of age or older or a student fourteen or fifteen years of age who qualifies for juvenile offender status under subdivision forty-two of section 1.20 of the criminal procedure law, who has been determined to have brought a weapon or firearm to school in violation of this subdivision to the appropriate law enforcement officials.

(2) Nothing in this paragraph shall be deemed to mandate such action by a school district pursuant to subdivision one of this section where such weapon or firearm is possessed or brought to school with the written authorization of such educational institution in a manner authorized by article two hundred sixty-five of the penal law for activities approved and authorized by the trustees or board of education or other governing body of the public school and such governing body adopts appropriate safeguards to ensure student safety.

(3) As used in this paragraph: (i) "firearm" shall mean a firearm as defined in subsection a of section nine hundred twenty-one of title eighteen of the United States Code; and (ii) "weapon" shall be as defined in paragraph 2 of subsection g of section nine hundred thirty of title eighteen of the United States Code.

e. Procedure after suspension. Where a pupil has been suspended pursuant to this subdivision and said pupil is of compulsory attendance age, immediate steps shall be taken for his or her attendance upon instruction elsewhere or for supervision or detention of said pupil pursuant to the provisions of article seven of the family court act. Where a pupil has been suspended for cause, the suspension may be revoked by the board of education whenever it appears to be for the best interest of the school and the pupil to do so.

f. Whenever the term "board of education or superintendent of schools" is used in this subdivision, it shall be deemed to include community boards of education and community superintendents governing community districts in accordance with the provisions of article fifty-two-A of this chapter.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

DYLAN FINKLE, by his Parent and Natural Guardian, ANDREW FINKLE,

Plaintiff,

- against -

BOARD OF EDUCATION OF SYOSSET CENTRAL SCHOOL DISTRICT; JAMES KASSEBAUM, Both Individually and in His Capacity as Principal of the HARRY B. THOMPSON MIDDLE SCHOOL; and CAROLE G. HANKIN, Both Individually and in Her Capacity as Superintendent of the of the SYOSSET CENTRAL SCHOOL DISTRICT,

Defendants.

----------X

AMENDED COMPLAINT

JURY TRIAL DEMANDED

CV 04 4251 (TP) (JO)

Plaintiff, Dylan Finkle, by his parent and natural guardian, Andrew Finkle, by his attorneys, New York Civil Liberties Union Foundation, E. Christopher Murray, cooperating attorney, as and for his amended complaint herein, alleges:

Preliminary Statement

1. Plaintiff, Dylan Finke, wrote a fictional story in a journal he maintained as an assignment given by his sixth grade English teacher. The story was based on a horror film,

and although his parents and teacher had read the story without incident, another teacher (not his classroom teacher) read the story and brought it to the principal. Solely as a result of Dylan's creative writing, he was suspended for 30 days, the parents of other students were falsely told that Dylan had threatened their children, and Dylan was subjected to testing by the school psychiatrist without the knowledge or permission of his parents.

2. The arbitrary, egregious and unconstitutional actions of the principal and Superintendent of Schools have resulted in violations of Dylan's procedural and substantive due process rights, and his First, Fifth and Fourteenth Amendment rights, as well as rights guaranteed by the New York State Constitution and the State of New York. In addition, as a result of actions by the defendants, Dylan has been ostracized at school, held up to public ridicule, lost valuable education time, and suffered severe emotional distress.

Jurisdiction

3. This case arises under 42 U.S.C. §§1983 and 1988, as well as the statutory and common laws of the State of New York. Jurisdiction is conferred on this Court by 28 U.S.C. §§1331, 1343 and 1367.

Venue

4. Venue is proper in this District pursuant to 28 U.S.C. §1391(b) in that the events giving rise to this action occurred in this District, and all of the parties reside in this District.

Parties

5. At all relevant times, plaintiff, Dylan Finkle, who is now 12 years old and of compulsory school age, resided at 36 Marlene Drive, Syosset, New York 11791 and was enrolled in

the Harry B. Thompson Middle School as a sixth-grade student.

6. At all relevant times, defendant Board of Education of the Syosset Central School District (sometimes hereafter "School District") was a board organized and established under the Education Law of the State of New York and was the governing body of the Syosset Central School District.

7. At all relevant times, defendant James Kassebaum ("Kassebaum") was the principal of the Harry B. Thompson Middle School which is within and part of the Syosset Central School District.

8. At all relevant times, defendant Carole Hankin ("Hankin") was the Superintendent of the Syosset Central School District and, as such, was the chief administrative officer of the School District, as well as policymaker on behalf of the School District with the authority, *inter alia*, to establish procedures for the suspension of students and had sole authority to determine whether a student should be suspended for more than five (5) days.

BACKGROUND AND FACTS RELEVANT TO ALL CAUSES OF ACTION

a. The *Halloween* Story

9. At the beginning of the 2003-2004 school year, Dylan, who was ten years old at that time, and the other students in the sixth grade English class taught by Philip Kaiser were directed to maintain a written journal where they could "express thoughts, concerns or feelings."

10. The journal was considered an ongoing assignment, and Dylan was given no instructions on what he should write

or what type of material would be considered inappropriate. To the contrary, Dylan was advised that he was free to write whatever he wanted in the journal, including poems and fictional stories, and the journal was to be a forum wherein Dylan could utilize and develop his creative writing abilities.

11. At no time was Dylan advised or instructed that he could be punished for what he wrote in his journal.

12. Following his teacher's instructions, Dylan maintained a journal wherein he wrote short stories and numerous poems.

13. Upon information and belief, Dylan's classmates also maintained journals wherein they wrote fictional stories and poems.

14. One of the fictional stories Dylan wrote in his journal was a "chapter book" modeled on the horror movie *Halloween*.

15. While writing this *Halloween* story, which contained graphic descriptions of a character named "Dylan" committing acts of violence, Dylan informed his parents of its contents and asked his parents if it was proper to include in the story the names of actual students at his school, as well as the fictional names he had included in the story. His parents instructed Dylan that he could include the names of students as long as he received their permission.

16. At the time Dylan wrote his short story, he had not been involved in any violent acts in school, had never engaged in any kind of threatening behavior, and had no prior disciplinary record.

17. On October 3, 2003, Dylan was in his English class when Mr. Kaiser was not present because he was late following a meeting. When his English teacher arrived, Dylan was in front of the class reading a poem that he had written.

18. Mr. Kaiser entered the class and requested that Dylan sit down. However, the other students in the class urged Dylan to read his *Halloween* story and Mr. Kaiser then joined in this request. Dylan read a few chapters from his story without incident while Mr. Kaiser checked attendance.

19. Upon information and belief, at no time did Mr. Kaiser or any of the other students express or feel discomfort while Dylan was reading his *Halloween* story, nor did anyone complain regarding this incident.

20. At not time while Dylan was reading his Halloween was his English class disrupted.

21. Thereafter, on the same date, during a voluntary program known as "Latin at Lunch," Dylan asked if he could read his story to a group of approximately 16 students. None of the students whose names were used for characters in the *Halloween* story participated in the Latin at Lunch program.

22. Instead of allowing Dylan to read his story, the instructor, Ms. St. Johns, started to read the story to herself. After Ms. St. Johns read three or four names that she did not recognize, she asked Dylan if these were names of actual students, and also asked if there were any portions of the story she should not read. Dylan told Ms. St. Johns that the names were those of actual students, but these students knew that their names were being used and that they had given him permission to do so. Dylan also said that Ms. St. Johns should not read Chapter 10 which described a female student kissing a boy.

23. At no time did Dylan's story create any disruption in the educational process in his school, nor could it reasonably be believed that his story could cause such disruption.

24. At no time was Dylan's story read to the students who were participating in the Latin at Lunch program.

25. Upon information and belief, Ms. St. Johns brought Dylan's *Halloween* story to the attention of Kassebaum.

26. Thereafter, Kassebaum, without inquiring as to the nature of the journal assignment, without discussing the matter with any student whose name was referenced in the *Halloween* story, and without discussing the content of the *Halloween* story or the circumstances in which it was written either with Dylan or his parents, suspended Dylan for five days.

27. Kassebaum then discussed the suspension with Dylan's parents and an angry exchange took place between Kassebaum and Dylan's father.

b. Psychological Testing of Dylan without His Parents' Consent

28. Although the notice to Dylan's parents stated that this principal's suspension was to begin on October 8, 2003 and continue through and including October 15, 2003, the School District refused to permit Dylan to attend class on October 7, 2003.

29. Instead, at the direction of the School District and Kassebaum, Dylan was interviewed by the school psychiatrist, Dr. Chrenshaw, an employee of the School District, for the full school day. Further, upon information and belief, on October 7, 2003, at the direction of the School District and Kassebaum, and as part of this employment responsibilities, Dr. Chrenshaw undertook a series of psychological tests on Dylan.

30. At no time did the School District or Kassebaum, or any other School District personnel, inform or request permission from Dylan's parents to conduct this psychological testing even though there was ample time to make such a request, and at no time was Dylan asked if he would consent to the psychological testing.

31. Upon information and belief, Dr. Crenshaw found no indication that Dylan was a threat to himself or others.

32. Upon information and belief, on or about October 8, 2003, Kassebaum thereafter contacted the parents of at least two other students who attend the Harry B. Thomson Middle School with regard to Dylan's alleged conduct, and Kassebaum stated that Dylan Finkle had engaged in "threatening behavior" towards their children and "harassment of deviant sexual nature."

33. Dylan had not engaged in "threatening behavior" or "harassment of deviant sexual nature," and when Kassebaum made these false and defamatory statements to the contrary, he knew or should have known that they were false.

34. Without investigating the situation further, and in retaliation against Dylan for his association with this father, with whom Kassebaum had an angry exchange, Kassebaum requested a Superintendent's Hearing be held to determine whether further punishment was appropriate for Dylan.

35. Dylan's parents were given notice that a Superintendent's Hearing would be held on for October 14, 2003 based on allegations that Dylan had threatened the use of a weapon and threatened and intimidated other students.

36. At no time prior to Dylan's suspension, or prior to the Superintendent's Hearing, did defendants recommend or suggest to Dylan's parents that in lieu of disciplinary action, Dylan could undertake private psychological testing to determine if he was a threat to other student.

c. <u>The Superintendent's Hearing</u>

37. The Superintendent's Hearing was conducted on October 21, 2003. At this hearing, the School District alleged three violations of the School District's Code of Conduct.

Specifically, violations of Section D(5) (threatening the use of a weapon), Section E(5) (harassment) - a charge added at the Superintendent's Hearing and not contained in the initial letter given to Dylan's parents notifying them of the Superintendent's Hearing, and Section E(6) (intent to intimidate or threaten other students).

38. The Hearing Officer designated by the School District for Dylan's Superintendent's Hearing was Sharon Berlin, Esq., an attorney with the then-firm of Rains & Pogrebin, P.C.

39. At the time, the School District had routinely retained Rains & Pogrebin for a variety of legal matters and, upon information and belief, continues to utilize Ms. Berlin's services as an attorney.

40. Upon information and belief, neither New York's Education Law §3214, which concerns when a student may be suspended for more than five (5) days, nor the rules or practices of the School District, require the utilization of rules of evidence or any other particular rules of procedure before a student can be suspended for more than five (5) days.

41. Upon information and belief, at the time of Dylan's Superintendent's Hearing, neither Education Law §4214, nor the rules and practices of the School District, set forth any policies or regulations to assure the impartiality of the hearing officers utilized for Superintendent's Hearings.

42. Upon information and belief, at the time of Dylan's Superintendent's Hearing, the School District had not provided Ms. Berlin with any training regrading hearings, rules of evidence or standard of proof to be utilized at Superintendent's Hearings.

43. Upon information and belief, at the time of Dylan's Superintendent's Hearing, the School District had not established rules of evidence, standards of proof, requirements of impartiality or guidelines as to the level of discipline which should be imposed at Superintendent's Hearings, nor had any of these standards been communicated to the hearing officers that the School District utilizes for Superintendent's Hearings, including Ms. Berlin.

44. Upon information and belief, at the time of Dylan's Superintendent's Hearing, the School District had not defined with particularity the offenses designated in its Code of Conduct, nor has the School District trained or instructed the hearing officers as to what conduct may constitute a violation of the Code of Conduct.

45. Upon information and belief, at the time of Dylan's Superintendent's Hearing, the School District had not communicated or instructed its students, including Dylan, as to what conduct may constitute a violation of the Code of Conduct.

46. Upon information and belief, at the time of Dylan's Superintendent's Hearing, the School District had not informed its students, including Dylan, as to what type of language utilized in written assignments would violate the Code of Conduct or would constitute threatening behavior or harassment.

47. No testimonial evidence was offered at the hearing by any student who was allegedly threatened or harassed by Dylan.

48. No evidence was offered as to any harassment by Dylan of any student and no evidence was offered that any student was even informed of the contents of Chapter 10.

49. No evidence was offered that Dylan and/or his story disrupted the function of Dylan's school, or could reasonably be believed to cause a disruption of the functioning of Dylan's school.

50. At the Superintendent's Hearing, without notice to Dylan's parents or his attorney, the School District introduced, over objection, alleged statements from students describing their reaction to Dylan's story, which statements had been solicited by the School District after Dylan was suspended.

51. At no time was Dylan's counsel permitted to question the students who purportedly made the statements nor were the students even identified.

52. The sole evidence offered by the School District at the Superintendent's Hearing was that Ms. St. Johns read Dylan's *Halloween* story and reported it to other school officials.

53. The Superintendent's Hearing was conducted pursuant to a policy and procedure adopted by defendant Hankin.

d. <u>Hearing Officer's Report and Superintendent's Suspension</u>

54. On October 23, 2003, the Hearing Officer's Report recommended sustaining all three charges and stated that the Hearing Officer "defer[red] to the recommendation of the administrative team and recommend[ed] that Dylan be suspended from school for 30 school days, with credit for nine days for which he has already been suspended".

55. The Hearing Officer denied Dylan's motion to dismiss the charge of violating Code of Conduct Section 5(E) even though this charge was not contained in the notice of

charges provided to Dylan's parents before the Superintendent's Hearing.

56. The Hearing Officer then recommended that all of the charges against Dylan be upheld even though no evidence was presented that anyone was actually threatened, determining that the words in Dylan's story, even if not read, constitute wrongful conduct under the Code of Conduct, and, because Dylan had written the story in private, by himself, over a period of time, his conduct constituted harassment.

57. In determining Dylan's guilt of the charges and the appropriate punishment, the Hearing Officer observed:

> "To the contrary, the District's witness testified about how seriously Dylan's writings were viewed, that they caused Ms. St. John to become alarmed; that Mr. Kaiser had to interrupt his 8th period class to tend to the situation; that a meeting of the HBT administrative staff was interrupted; that administrative staff had to hold meetings with the Finkles on at least four occasions as a result of the incident; that administrators remained at school into the evening on October 3 to discuss how to handle the situation; and that Mr. Kaiser had to spend time during his English class handling the aftermath of the issues raised by Dylan's journal."

58. The Hearing Officer also acknowledged the lack of any prior disciplinary problems with Dylan and Dylan's good performance at school. The Hearing Officer stated:

> "On the other hand, Dylan has no prior disciplinary record and by all accounts is an excellent student. This is a most difficult decision given that, by all accounts, Dylan loves school and will suffer from not being in school."

59. By letter dated October 23, 2003, defendant Hankin who, upon information and belief, failed and refused to review any of the substantive facts surrounding Dylan's alleged wrongful conduct, nor did she review Dylan's records, suspended Dylan for 30 school days.

60. Upon information and belief, other students attending middle school within the School District who engaged in similar or more severe conduct, including actual threats of violence, received suspensions of a lesser duration than Dylan's.

61. Upon information and belief, the School District, Kassebaum and Hankin at no time reviewed or read the journals maintained by other students to ascertain whether they contained descriptions of violent acts.

62. Upon information and belief, the reason Dylan received a longer suspension than other students similarly situated is because of his association with his father who had questioned and challenged the School District and Kassebaum's actions.

e. <u>Procedural History</u>

63. By letter dated October 28, 2003, Dylan appealed the Superintendent's decision to suspend Dylan for 30 days to the School Board, and the School Board denied the appeal.

64. Dylan also appealed to the Commissioner of Education who denied a stay of the suspension, and then after

the suspension had been completed, determined that the appeal was moot.

65. Since the Commissioner of Education did not decide the appeal until Dylan's suspension was completed, Dylan had no other process available to him under New York law.

66. Within ninety (90) days of October 2, 2003, plaintiff served a Notice of Claim on the School District regarding the events involving Dylan, and thirty (30) days have elapsed from the date of service of the Notice of Claim and the commencement of this action.

f. Damages

67. As a result of defendant's conduct, Dylan has been held up to public ridicule, has been ostracized at school, lost educational opportunities, and has suffered severe emotional distress.

AS AND FOR A
FIRST CAUSE OF ACTION

68. Plaintiff repeats and realleges each and every allegation of the complaint contained in paragraphs "1" through "67" as if fully set forth herein.

69. New York's Education Law §3214 does not specify or describe the procedures, rules or manner in which a hearing must be conducted before so a student may be suspended for more than five (5) school days, but directs that a hearing be conducted.

70. The Superintendent's Hearing involving Dylan's *Halloween* story was undertaken pursuant to School District policy adopted by defendant Hankin and was (a) conducted without any evidentiary rules; (b) without adequate description of what conducted constituted a violation of the Code of Conduct; (c) without Dylan or his attorney being able to

question purported witnesses; (d) without notice to Dylan of the charges brought against him; (e) was before a partial hearing officer who had no training and no knowledge as to what conduct constitutes a violation of the Code of Conduct; (f) without any particular rules of procedure; (g) without any notice to Dylan that he could be; and (h) without any guidelines as to the punishment that would be appropriate for the type of violation of the Code of Conduct allegedly committed by Dylan.

71. Pursuant to her standard practiced procedure, defendant Hankin undertook no independent process other than the Superintendent's Hearing prior to deciding to suspend Dylan for thirty (30) days.

72. Defendant Hankin had sole authority to suspend Dylan for more than five (5) days.

73. By reason of the above, defendants' suspension of Dylan from school deprived Dylan of a property right to attend public school as provided by state law, violating Dylan's due process rights secured by the Fifth and Fourteenth Amendments to the United States Constitution.

AS AND FOR A
SECOND CAUSE OF ACTION

74. Plaintiff repeats and realleges each and every allegation of the complaint contained in paragraphs "1" through "73" as if fully set forth herein.

75. The thirty (30) day suspension of Dylan for conduct which did not violate the Code of Conduct was excessive and arbitrary and capricious.

76. By reason of which, defendants violated Dylan's substantive due process rights secured by the Fifth and Fourteenth Amendments of the United States Constitution.

AS AND FOR A
THIRD CAUSE OF ACTION

77. Plaintiff repeats and realleges each and every allegation of the complaint contained in paragraphs "1" through "76" as if fully set forth herein.

78. Defendants provided a forum and instructed Dylan to write creative fictional stories.

79. At no time was Dylan informed of any restrictions as to the type of material that could be written in his journal.

80. At no time did Dylan write in his journal any encouragement, direction or urging that anyone engage in violent acts or other illegal conduct, nor did Dylan threaten any student or teacher.

81. The content of Dylan's journal did not disrupt the education process of his school, nor could it be reasonably believed to present a risk of such disruption.

82. Dylan was suspended based solely upon the defendants' disagreement and objection to the content of Dylan's journal.

83. By reason thereof, defendants violated Dylan's rights secured by the First and Fourteenth Amendments of the United States Constitution.

AS AND FOR A
FOURTH CAUSE OF ACTION

84. Plaintiff repeats and realleges each and every allegation of the complaint contained in paragraphs "1" through "83" as if fully set forth herein.

85. Defendants imposed punishment upon Dylan in retaliation for his association with his father and as a result of the content of his fictional stories.

86. Upon information and belief, other students similarly situated, including students who had engaged in acts of physical assault against other students, received punishments less severe than Dylan.

87. Dylan was singled out for excessive and unequal punishment in retaliation for his exercising his free speech and rights of association granted by the First Amendment of the United States Constitution.

88. By reason thereof, defendants violated Dylan's rights to the equal protection of the Fifth and Fourteenth Amendments of the United States Constitution.

AS AND FOR A
FIFTH CAUSE OF ACTION

89. Plaintiff repeats and realleges each and every allegation of the complaint contained in paragraphs "1" through "88" as if fully set forth herein.

90. Defendants' conduct violated Dylan's rights secured by the Constitution of the State of New York.

AS AND FOR A
SIXTH CAUSE OF ACTION

91. Plaintiff repeats and realleges each and every allegation of the complaint contained in paragraphs "1" through "90" as if fully set forth herein.

92. Defendant Kassebaum's statements that Dylan had engaged in "threatening behavior" and "harassment of a deviant sexual nature" were false and defamatory.

93. Defendant Kassebaum knew or should have known the statements were false and defamatory and defendant Kassebaum uttered the statements with malice towards Dylan

and in retaliation for Kassebaum's angry exchanges with Dylan's father.

94. As a result of defendant Kassebaum's false and defamatory statements, Dylan has been ostracized by other students, has been held up to public ridicule, and has suffered severe emotional distress.

AS AND FOR A
SEVENTH CAUSE OF ACTION

95. Plaintiff repeats and realleges each and every allegation of the complaint contained in paragraphs "1" through "94" as if fully set forth herein.

96. The subjecting of Dylan to psychological testing without obtaining his parent's permission violates Dylan's rights secured by the Fourth and Fourteenth Amendments of the United States Constitution and *Public Health Law* §2504 of the State of New York.

AS AND FOR A
EIGHTH CAUSE OF ACTION

97. Plaintiff repeats and realleges each and every allegation of the complaint contained in paragraphs "1" through "96" as if fully set forth herein.

98. By reason of the above, plaintiff is entitled to recover his attorneys' fees for this action pursuant to 42 U.S.C. §1988.

WHEREFORE, plaintiff demands judgment:

a. On his First, Second, Third and Fourth Causes of Action, in an amount to be determined but believed to exceed $250,000, expunging the record of Dylan's suspension, and enjoining defendants from suspending Dylan for more than five (5) days without a hearing in compliance with the due process requirements of the United States Constitution.;

b. On his Fifth Cause of Action, in an amount to be determined but believed to exceed $250,000;

c. On his Sixth Cause of Action, in an amount to be determined but believed to exceed $100,000;

d. On his Seventh Cause of Action, in an amount to be determined but believed to exceed $50,000;

e. On the Eighth Cause of Action, the reasonable attorneys' fees for this action;

f. Punitive damages in the amount of $1,000,000;

g. The costs and disbursements of this action; and

h. Such other and further relief as the Court deems appropriate.

Dated: Garden City, New York
March 3, 2005

NEW YORK CIVIL LIBERTIES UNION FOUNDATION

By: /s/ E. Christoher Murray
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No. 06-542

FILED
DEC 20 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

D. F., by his Parent and Natural Guardian, ANDREW FINKLE,

Petitioner,

v.

BOARD OF EDUCATION OF SYOSSET CENTRAL SCHOOL DISTRICT; JAMES KASSEBAUM, Both Individually and in His Capacity as Principal of the HARRY B. THOMPSON MIDDLE SCHOOL; and CAROLE G. HANKIN, Both Individually and in Her Capacity as Superintendent of the SYOSSET CENTRAL SCHOOL DISTRICT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether, in the context of a school disciplinary hearing where the Petitioner was given notice of the charges against him, an opportunity to present evidence in his behalf, an opportunity to be represented by counsel, an opportunity to cross-examine all witnesses against him, and the right to subpoena and have brought to the hearing all witnesses he believed were necessary to enable the hearing officer to render an appropriate decision, there is any question as to whether Petitioner was not given sufficient procedural due process because the hearing officer agreed to accept into evidence anonymous statements of students as to how they felt about the Story giving rise to the disciplinary hearing at issue.

2. Whether, in the context of pleadings specifically referencing and incorporating the content of a story depicting the Petitioner stalking and killing his fellow students in gruesome ways, depicting 10 and 11 year old boys and girls engaged in sexual activities, depicting a specific classmate in various states of undress and at one point having her clothes being held in front of her to shield her naked torso from view ripped from her hands, engaged in sexual activity, and being physically assaulted by the Petitioner, and referencing and incorporating by reference the record of an evidentiary hearing at which the Petitioner admitted to writing the story and his mother admitted to his having acknowledged having read it to certain classmates (including the little girl he stalked in the story and depicted in the manner discussed above), the District Court had a sufficient basis for concluding that the story represented a true threat and/or the potential for substantial disruption to school activities so as to permit the imposition of discipline without such discipline amounting to a First Amendment violation.

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INTRODUCTION

A simple internet search for information concerning school violence reveals a truly frightening reality: school violence is an enormous, worldwide problem, and threats of school violence must be taken *very* seriously. Indeed, it is sadly well known that very young children have shot and killed other students on what has now become an all too numerous set of tragic occasions over the last decade.[1] How school administrators respond to this reality, and how the Federal District Courts analyze the constitutionality of their conduct in attempting to protect students from the threat of school violence is an issue that is clearly one that merits serious consideration. However, this case is an example of how laws and procedures now in place, when followed, provide a highly sufficient basis for protecting the rights of students accused of conduct in violation of school disciplinary codes. This is NOT a case that should require this Court to give a moment's pause to consider whether the Petitioner was given all the constitutional due process he was due. Neither is it a case which this Court should wonder whether the courts below acted in a fashion that calls into question the legal sufficiency of their conclusion that, in this case, on the record before them, the Petitioner could reasonably be concluded to have engaged in speech which either constituted a true threat, or which could be concluded to have reasonably been forecast to have caused substantial disruption to school activities and/or impinged upon the

---

[1] In *Commonwealth v. Milo M.*, 740 N.E.2d 967, 973 (Sup. Jud. Ct. Mass. 2001), the Court, making reference to a number of publicized school shooting incidents, stated it could "take judicial notice of the actual and potential violence in public schools" and the "climate of apprehension" concerning school violence which exists as a result.

rights of other students if not considered by the school's administrators, reviewed, and made the basis for a disciplinary action.

In this case, a 10 year old student at a Long Island, New York middle school wrote a story about himself and his fellow classmates that depicted him as a troubled, angry young boy who stalks and murders a number of his fellow classmates. In his story, as well, he depicted fellow 10 and 11 year old students engaged in sexual activity, and one particular young girl "making out topless," sleeping with another student, being viciously assaulted by the Petitioner, and having clothes she was holding in front of her naked torso ripped from her hands by the Petitioner before he assaulted her. In both his complaint, and in the record of the disciplinary hearing referenced in the complaint, it is acknowledged by the Petitioner (and his mother) that he repeatedly tried to read the story to other classmates, and actually succeeded in doing so with several of them, including the young girl he stalks throughout the story, and who is depicted in such a sexually charged manner.

Considering the pleadings, and considering the record of the evidentiary hearing incorporated by reference therein, the District Court concluded that dismissal of Petitioner's procedural due process and First Amendment claims was appropriate, and the Second Circuit sustained the decision upon review. Petitioner argues that the District Court and Circuit Court of Appeals rulings were improper, in failing to conclude that the evidentiary hearing held with respect to a consideration of whether any discipline beyond the middle school principal's issuance of a five day suspension was merited was fatally flawed because the hearing officer allowed into evidence statements of anonymous students

regarding how they felt about the story. However, this contention ignores the fact that the due process given to Petitioner complied with the level of due process required both under New York state law and all iterations of the minimum level of due process required in the context of school disciplinary proceedings that have been made by the various Circuit Courts. Petitioner further argues that the District Court erred in finding that there was a "true threat" without first permitting the parties to engage in discovery, and rule upon testimony and evidence developed pursuant to federal discovery. But the fact is that the District Court appropriately had before it the story, admissions in the pleadings of the critical conduct in issue made in the Complaint, and the record of a full evidentiary hearing which it correctly considered on the motions to dismiss in light of Petitioner's having relied upon and incorporated by reference the record into the pleadings.

The Complaint and record properly before the courts below make clear that Petitioner wrote a truly disturbing story which, at very least, was something that could be perceived as demeaning of, harassing, and embarrassing to the little girl who is the main focus of the story. The Complaint and record make clear, as well, that the Petitioner admitted having attempted repeatedly to read the story to his classmates, and succeeded in doing so on a number of occasions. And the Complaint and record before the courts below make clear that once consideration was given to the potential for imposition of disciplinary charges above the 5 days he was originally suspended by the principal, Petitioner was provided with advance notice of the charges being proffered against him (and the factual basis therefore), advance notice of the disciplinary hearing, an opportunity to retain counsel, an

opportunity to present his side of the case, an opportunity to subpoena witnesses, and an opportunity to cross-examine the witnesses presented against him.

For these reasons, it is respectfully requested that the Petition for Writ of Certiorari be denied.

COUNTERSTATEMENT OF THE CASE

The Petitioner — by his parent and guardian, Andrew Finkle — is a young boy who is now 12 years old. A little over two years ago, when he was 10, and in the sixth grade, he wrote a story in his journal at school (the "Story"), which he tried to read aloud to his English class and at a lunch study program referred to as "Latin at Lunch." (Am. Cmpl ¶¶ 18, 21) (Pet. App. 0038) [JA 27][2] The Amended Complaint filed by Petitioner specifically acknowledges that Petitioner wrote the Story, and made repeated efforts to read it to his fellow classmates, and in her testimony at the disciplinary hearing made the subject of the lawsuit, Petitioner's mother acknowledged that Petitioner had admitted to her having read the story to other classmates, including a young girl featured prominently in the narrative named "Shanna". (Am. Cmpl. ¶¶ 17-21) (Pet. App. 0037-0038) [JA 27].

In the Story [JA 49-63], Petitioner describes a boy with Petitioner's name who outwardly seemed bright and happy, but inwardly was filled with anger and rage at his fellow students. [JA 49] The Story contains graphic depictions of murder of these students by Petitioner, and scenes in which

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[2] References to all documents in the Joint Appendix, which was before the U.S. Court of Appeals for the Second Circuit, will be made to "JA ___."

a female classmate ("Shanna"), is initially stalked by him, witnesses him kill her boyfriend, and is later described as "making out topless on a table" with another boy, before being come upon by Petitioner, who kills this boy as well, and in his rage, attempts to kill her also. [JA 51-52 & 60]. Thereafter, after being viciously kicked against a wall by Petitioner, and having the shirt she was holding in front of her to shield her naked torso ripped from her hands, Shanna, with "[b]lood . . . pouring out of her mouth," responds by kissing him and thereby saving herself. [JA 61] In a separate section, another girl having sex with a boy is witnessed by Petitioner, and then brutally killed by him as well. [JA 62].

After reading portions of the Story at the start of his English class, while his teacher was distracted and paying attention only to taking attendance, the Amended Complaint alleges that Petitioner was unsuccessful in his efforts to read the story to the "Latin at Lunch" group. (Am. Cmpl. ¶¶ 18, 22) (Pet. App. 0038) [JA 27] Before permitting Petitioner to read the story, his teacher, Diane St. John, had asked Petitioner if she could read it, and then did so. (Am. Cmpl. ¶ 22) (Pet. App. 0038) [JA 27] Seeing the sexual and graphically brutal content of the Story, and learning from Petitioner that children identified in the Story were Petitioner's classmates, Ms. St. John brought the Story to the attention of the school's Principal, James Kassebaum. (Am. Cmpl. ¶ 25) (Pet. App. 0039) [JA 28] After deliberation as to how to address the situation, Mr. Kassebaum notified and met with Petitioner's parents (along with Assistant Principals Gail Grenzig and Roger Bloom, and the school psychologist, Marcus Crenshaw) to discuss a planned initial 5 day suspension, and potential further suspension following a hearing to consider the circumstances and the appropriate disciplinary measures to be taken. (Letters Advising of Suspension and Hearing) [JA 320-321]

Subsequently, upon notice to Petitioner's parents, an independent hearing officer was appointed, and a hearing was held at which the Story was reviewed, testimony from Ms. St. John, Phillip Kaiser (D. F.'s Sixth Grade teacher), Gail Grenzig (the school's assistant principal), Principal Kassebaum, and Petitioner's parents was given, and consideration was given to whether Petitioner had violated the following sections of the school's Code of Conduct:

- Section D(5), providing that a student may not "[e]ngage in conduct that is violent";

- Section E(5), providing that a student may not engage in conduct that "endangers the safety, morals, health or welfare of others," including "[h]arassment, which includes a sufficiently severe action or persistent pervasive pattern of actions or statements directed at an identifiable individual or group which are intended to be, or which a reasonable person would perceive as ridiculing or demeaning"; and

- Section E(6), providing that a student may not engage in conduct that "endangers the safety, morals, health or welfare of others," including "[i]ntimidation, which includes engaging in actions or statements that put an individual in fear of bodily harm."

(Hearing Officer's Findings; Hearing Transcript; Code of Conduct) [JA 80-312]

At the commencement of the Hearing, before any testimony was taken, the Hearing Officer advised that in addition to having a right to be represented by counsel, and to present witnesses and other evidence on his own behalf, Petitioner had "[t]he right to confront and cross-examine all witnesses, and if there are witnesses you would like to have testify who are not here now, your attorney can issue a subpoena to have them be present and testify." [JA 830]. The hearing officer also explained the burden of proof, discussed the manner in which the hearing would be held, and explained the procedures that would be followed in determining the appropriate measure of discipline to impose in the event she first concluded that Petitioner was guilty of the disciplinary code violations in issue. [JA 146-148] Petitioner's parents were present at the hearing and testified on his behalf, and Petitioner was represented by an attorney who conducted cross-examination of the witnesses, and offered evidence of Petitioner's character. [JA 96-97, 148-155, 179-184, 197-202, 209-251] Although Petitioner's attorney objected to the introduction into evidence of certain journal entries made by students in Petitioner's English class regarding how they felt about Petitioner's Story (including a journal entry by Shanna) [JA 136-147], no request was made for permission to subpoena Shanna or any of the other students and have them made available for cross-examination.

Following the hearing, the hearing officer specifically noted the Finkles' argument against the imposition of any further discipline, pointing out that:

> The Finkles argued that [Petitioner's] writing is a piece of creative literature and that it is not responsible or objective to expect that anyone would fear bodily harm. His writings are a rip off

> of the Halloween movies. That it is creative work in connection with [Petitioner's] English class. It is protected freedom of expression and speech, and that there is no true threat to any individual.
>
> The Finkles argued that there is no evidence that [Petitioner] threatened to use a weapon; that his journal is creative literature and not violent conduct within the meaning of the Code of Conduct, Section D(5). The Finkles argued that [Petitioner] was not charged with a violation of Code of Conduct Section E(5), harassment, in the notice of charges (D.Ex.2), and therefore this charge must be dismissed. They further argued that [Petitioner's] actions were not sufficiently severe or pervasive. That his writings were not demeaning to his characters. Finally, they argued that [Petitioner] did not violate Code of Conduct Section E(6), intimidation, because [Petitioner] did not make any true threats against any other individuals and the District failed to produce evidence of a true threat against anyone. They argue that the District witnesses said individuals were "offended" by his writing and that this is not covered by the intimidation provision of the Code of Conduct.

(Hearing Officer's Findings at 10) [JA 331] However, after considering all the evidence presented at the hearing, and considering the credibility of the witnesses, the hearing officer concluded that each of the Code of Conduct sections in question had been violated, and that a suspension of 30 days — with credit given for the days Petitioner had been suspended prior to the hearing — would be appropriate.

[JA 336] This recommendation was adopted by the School's Superintendent, Carole Hankin. (Hearing Officer's Findings at 16-17; Am. Cmpl. ¶ 59) [JA 337-338, & 34-35] (Pet. App. 0045).

Petitioner's parents thereafter appealed the Superintendent's decision to suspend Petitioner for 30 days to the School District, and the School District denied the appeal. (Am. Cmpl. ¶ 63) (Pet. App. 0045) [JA 35] They also appealed to the Commissioner of Education, who denied a stay of the suspension, and then after the suspension had been completed, determined that the appeal was moot. (Am. Cmpl. ¶ 64) (Pet. App. 0045-0046) [JA 35] Eschewing Article 78 relief in state court, Appellant then commenced this action. [JA 6-22]

After full briefing of the issues, oral argument was held before the District Court on July 28, 2005, upon a record which included the Amended Complaint, the Story, the various written notices provided to the Finkles regarding the charges against Petitioner, his initial 5 day suspension and the scheduling of a hearing regarding the charges, the minutes of the hearings held on October 14, 2003 and October 21, 2003, the hearing officer's findings and recommendation, and the relevant provisions of the Board of Education's Code of Conduct. The District Court then issued a decision granting the defendants' motions to dismiss. [JA 389-413] The United States Court of Appeals for the Second Circuit affirmed the decision of the District Court in an unpublished opinion, on or about August 1, 2006.

REASONS FOR DENYING THE PETITION

A. THE PROCEDURAL DUE PROCESS AFFORDED TO PETITIONER WAS FULLY IN COMPLIANCE BOTH WITH NEW YORK STATE LAW AND ALL FEDERAL COURT ITERATIONS OF THE LEVEL OF DUE PROCESS REQUIRED IN SCHOOL DISCIPLINARY PROCEEDINGS WITH REGARD TO POTENTIAL SUSPENSIONS IN EXCESS OF 10 DAYS, AND ALTHOUGH ANONYMOUS STUDENT STATEMENTS WERE TAKEN INTO EVIDENCE, THERE IS NO REQUIREMENT THAT DISCIPLINARY PROCEEDINGS NOT BE CONDUCTED IN SUCH A WAY AS TO TAKE INTO ACCOUNT CONSIDERATION OF THE RIGHTS AND INTERESTS OF MINOR CHILDREN, THE STATEMENTS WERE NOT CRITICAL TO THE HEARING OFFICER'S RULING, AND THE PETITIONER AT ALL TIMES HAD THE RIGHT TO REQUEST THAT WITNESSES BE SUBPOENAED TO TESTIFY AT THE HEARING, BUT CHOSE NOT TO DO SO

As Petitioner correctly states in his Petition,

> "[t]his Court has consistently held that the procedural due process that is required varies depending on the nature of the private interest involved, the risk of an erroneous deprivation through the procedures that are used, the probable value of additional or substitute procedures, and the burden upon a government caused by any additional or substitute procedural requirements."

(Petition, p. 9) (citing *Zinermon v. Burch*, 494 U.S. 113 (1990)). The benefit of the law as it exists is that it doesn't try to create an enormously complicated structural system to address how a fair hearing may be given under every possible circumstance, while it, at the same time, provides that important interests are balanced, such that hearings are conducted in a fair manner. It also permits flexibility for "procedures to be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard." *Mathews v. Elridge*, 424 U.S.319, 349 (1976) (internal quotation omitted).

The circuit courts have also consistently applied this balancing test in the context of student suspension hearings and have generally imposed certain basic requisites for ensuring that a student facing school discipline is afforded due process. For example, in *J.S. ex. rel. Duck v. Isle of Wight County Sch. Bd.*, 362 F. Supp. 2d 675, 681-682 (F.D. Va. 2005) and in *Gomes v. University of Maine System*, 365 F. Supp. 2d 6, 16 (D. Me. 2005), it was suggested that minimum requirements of procedural due process in a school disciplinary hearing involving possible expulsion or lengthy suspension are met where: (1) the student is advised of the charges against him; (2) the student is informed of the evidence against him; (3) the student has an opportunity to be heard in his own defense; (4) no punishment is issued except upon substantial evidence; (5) the student is permitted the assistance of a lawyer; (6) a hearing is held at which the student is permitted to confront and to cross-examine the witnesses against him; and (7) the witness is afforded the right to an impartial tribunal, which must make written findings. *See Gomes*, 365 F. Supp. 2d at 16; *J.S. ex. rel. Duck*, 62 F. Supp. 2d at 681-682; *see also Palmer v. Merluzzi*, 868 F.2d 90, 95 (3d Cir. 1989); *Newsome v. Batavia Local School*

Dist., 842 F.2d 920, 923-24 (6th Cir. 1988); *Gorman v. University of Rhode Island*, 837 F.2d 7, 14 (1st Cir. 1988); *Nash v. Auburn University*, 812 F.2d 655, 660 (11th Cir. 1987).

In discussing the requirements of procedural due process in a school disciplinary hearing, the court in *Gomes*, quoting the First Circuit's decision in *Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 14, 16 (1st Cir. 1988), noted that:

> In fostering and insuring the requirements of due process . . . the courts have not and should not require that a fair hearing is one that necessarily must follow the traditional common law adversarial method. Rather, on judicial review the question presented is whether, in the particular case, the individual has had an opportunity to answer, explain, and defend, and not whether the hearing mirrored a common law criminal trial.
>
> . . . .
>
> [T]he courts ought not to extol form over substance, and impose on educational institutions all the procedural requirements of a common law criminal trial. The question presented is not whether the hearing was ideal, or whether its procedure could have been better. In all cases the inquiry is whether, under the particular circumstances presented, the hearing was fair, and accorded the individual the essential elements of due process. "[T]he Due Process Clause requires 'not an elaborate hearing' before a neutral party, but simply 'an informal give-and-take between

> student and disciplinarian' which gives the student an opportunity to explain his version of the facts'."

Gomes, 365 F. Supp. 2d at 17 (internal citations omitted).

For suspensions exceeding 5 days, New York law requires that the

> "pupil and the person in parental relation to such pupil shall have had an opportunity for a fair hearing, upon reasonable notice, at which time such pupil shall have the right of representation by counsel, with the right to question witnesses against such pupil and to present witnesses and other evidence on his behalf . . . ."

N.Y. Educ. Law § 3214(3)(c) (McKinney 2005).

In the present case, it is clear from the pleadings and the record appropriately before the courts on the defendants' motions that Petitioner was afforded procedural due process in his suspension hearing. The hearing was first commenced on October 14, 2003, but it was immediately suspended at Ms. Finkle's request, to permit her an opportunity to retain a lawyer. [JA 64-79]. Thereafter, on October 21st, a hearing was held at which Petitioner and his parents were present, counsel represented Petitioner, cross-examined the witnesses called to testify by the School District and questioned Petitioner's parents, and the hearing officer described at the outset Petitioner's rights and the procedures to be followed at the hearing. [JA 80-278]. A transcript of the hearing was prepared and made available to Petitioner [JA 80-278], and, by letter dated October 23, 2003, the hearing officer provided a report (a copy of which was faxed to Petitioner's attorney)

detailing the evidence and testimony presented at the hearings, her factual findings, the arguments of counsel, and her recommendations as to discipline to be imposed. [JA 323-338].

A review of the hearing officer's report and recommendation to Superintendent Hankin and the transcript of the hearing makes clear that Petitioner was afforded due process. Without question, the hearing officer's report and recommendation, and the transcript of the hearing, reveal that Petitioner's arguments were heard, and understood — all of them. He received a fair hearing.

Petitioner argues in his Petition that the hearing officer's decision to allow introduction into evidence at the hearing of written statements made by students in Petitioner's class concerning their thoughts, feelings or concerns they had about the Story [JA 67-84] violated Due Process. However, his argument is flawed in three major respects. First, the introduction into evidence of anonymous written statements in a school disciplinary hearing does not violate Due Process when viewed in the context of this particular case. As the District Court stated in its decision below:

> "[T]he School's interest in protecting the identities of the students outweighed any interest in cross-examination of them the Plaintiff may have had. Overall, Plaintiff was afforded the procedural protections to satisfy his due process rights; he was given a hearing, given sufficient notice of the hearing, and permitted to present a defense of his behavior with counsel. He offered his own parents to testify on his behalf. On the other side of the balance sheet, the School District had a keen

> interest in keeping the identity of the students confidential. The School District reasonably considered Plaintiff to be potentially violent, and by not disclosing the names of the students the School District was protecting them from possible retaliation by Plaintiff."

[Petition, APP 0012].

The District Court appropriately balanced the interests of Petitioner with the interests of the School District in protecting students from possible retaliation. This analysis is consistent with other decisions in this circuit and other circuits. *See Flaim v. Medical College of Ohio, et al*, 418 F.3d 629, 641 (6th Cir. 2005); *Jaska v. Regents of Univ. of Mich.*, 597 F. Supp. 1245, 1252 (E.D. Mich. 1984), *aff'd*, 787 F.2d 590 (6th Cir. 1986); *Winnick v. Manning*, 460 F.2d 545, 549-550 (2d Cir. 1972).

Second, this Court has stated that "[a]ll that is necessary to satisfy due process is that the procedures be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard, to insure they are given a meaningful opportunity to present their case." *Mathews*, 424 U.S. at 349 (internal quotes omitted). In this case, cross-examination of the students who wrote the statements was not necessary for Petitioner to have a meaningful opportunity to present his case, and Petitioner cannot establish substantial prejudice in theoretically not having the opportunity to do so. *See Watson v. Beckel*, 242 F.3d 1237, 1242 (10th Cir. 2001) ("In order to establish a denial of due process, a student must show substantial prejudice from the allegedly inadequate procedure."). The critical issue was whether the school administrators

reasonably perceived the Story to constitute a threat or reasonably forecast substantial disruption to school activities or impingement upon student rights. Although Shanna's statement introduced at the hearing indicated the story made her uncomfortable, the people whose assessments of the situation were most critical and who had the relevant knowledge and information were the teachers and school administrators who perceived the Story as a threat, each of whom was available to be cross-examined at the hearing. [JA 96-97, 148-55, 179-84, 197-202, & 209-51]. In addition, since Petitioner admitted that he wrote the Story for class and attempted to read it aloud — most of the critical facts were undisputed, rendering cross-examination of certain students unnecessary. *See, e.g, Flaim v. Medical College of Ohio, et al*, 418 F.3d 629, 641 (6th Cir. 2005) (holding that cross-examination was not essential where "it was not a choice between believing an accuser and an accused."); *Porter, et al v. Ascension Parish School Board, et al*, 393 F.3d 608, 624 (5th Cir. 2004) ("Whether a student admitted the charges leveled against him is relevant in determining substantial prejudice or harm.") (internal citation omitted); *Watson v. Beckel*, 242 F.3d 1237 (10th Cir. 2001) (holding that a student who was expelled without being afforded sufficient process was not prejudiced because he admitted his guilt); *Black Coalition v. Portland Sch. Dist. No. 1*, 484 F.2d 1040, 1045 (9th Cir. 1973) ("holding that a student was not entitled to relief on due process claim because he admitted all the essential facts which it is the purpose of a due process hearing to establish."); *Winnick v. Manning*, 460 F.2d 545, 549-550 (2d Cir. 1972) (noting that "[t]he right to cross-examine witnesses has not been considered an essential requirement of due process in school disciplinary proceedings").

Third, at the outset of the hearing, before any testimony was given and before any documentary evidence was proffered, the hearing officer specifically advised that Petitioner had "[t]he right to confront and cross-examine or question all witnesses, and if there are witnesses you would like to have testify who are not here now, your attorney can issue a subpoena to have them be present and testify." [JA 83]. Obviously, the attorney for Petitioner representing him at the hearing made the tactical decision to try to keep the student statements out of the record, while at the same time avoiding further intimidating the students by subpoenaing them, and avoiding the dangers presented to his client by having Shanna actually show up and testify at the hearing.[3] But this tactical decision should not obscure the fact that the opportunity was clearly presented — on the record — to Petitioner to have any witness not present at the hearing subpoenaed to testify. Given this opportunity, Petitioner simply has no basis to argue that the hearing afforded to him violated his rights to procedural due process, and no legitimate claim to the necessity, based on the facts in this case, for a Supreme Court assessment of each aspect of procedural due process specifically required in the context of school disciplinary proceedings such as the proceeding at issue in this case.

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[3] Instead, he relied upon Ms. Finkle to argue that Shanna would not have felt and did not feel uncomfortable, with her testimony at the hearing that she told Petitioner the Story "was gross, but it was okay." [JA 233]

B. THE DISTRICT AND CIRCUIT COURTS DID NOT ACT INCONSISTENTLY WITH THE OTHER CIRCUITS IN CONCLUDING THAT ON THE PLEADINGS AND RECORD PROPERLY BEFORE THEM IN THIS CASE PETITIONER'S COMPLAINT COULD PROPERLY BE DISMISSED AT THE PLEADING STAGE, IN LIGHT OF THE ALLEGATIONS AND ADMISSIONS MADE

This Court has clearly and unequivocally prescribed certain circumstances in which limitations can constitutionally be placed on speech. One such instance involves speech which constitutes a "true threat," and therefore is deemed not to be speech worthy of protection. *See Virginia v. Black*, 538 U.S. 343, 359 (2003). A second, in the context of student speech, arises when there is a reasonable basis for forecasting that such speech would "substantially interfere with the work of the school or impinge upon the rights of other studen..." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

As this Court has stated, "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group." *Virgina v. Black*, 538 U.S. 343, 359 (2003). In determining if speech constitutes a "true threat," it is not necessary to conclude that the speaker actually intended to carry out the threat or was even capable of doing so. *Id.* at 359-60. *See Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 624 (8th Cir. 2002); *Planned Parenthood of the Columbia/ Williamette, Inc. v. Am. Coalition of Life Activist*, 290 F.3d 1058, 1075 (9th Cir. 2002). Additionally, under the test

adopted in the Second and a number of other circuits, it is not necessary to conclude that a reasonable person standing in the shoes of the speaker would foresee that the person reading or listening to the speech would perceive the statement as a threat; "[t]he question is whether those who hear or read the threat reasonably consider that an actual threat has been made." *United States v. Viefhaus*, 168 F.3d 392, 396 (10th Cir. 1999); *cert. denied*, 527 U.S. 1040 (1999). *See Doe v. Pulaski*, 306 F.3d 616, 622 (8th Cir. 2002); *United States v. Malik*, 16 F.3d 45, 51 (2nd Cir. 1994), *cert. denied*, 513 U.S. 968 (1994); *United States v. Roberts*, 915 F. 2d 889, 890-91 (4th Cir. 1990).

As to where speech does not necessarily fall within the bounds of a "true threat," but school officials may nevertheless reasonably forecast substantial interference with school activities or impingement upon the rights of other students arising therefrom, limitations may also be constitutionally be placed on such speech even where the actual disruption has not yet taken place. Courts considering and applying the *Tinker* rule have noted that:

> *Tinker* does not require school officials to wait until disruption actually occurs before they may act. *Chandler v. McMinnville Sch. Dist.*, 978 F.2d [524] at 529; *Karp v. Becken*, 477 F.2d [171] at 175. "In fact, they have a duty to prevent the occurrence of school disturbances." *Id.* (quoting *Karp*, 477 F.2d at 175). Forecasting disruption is unmistakably difficult to do. *Tinker* does not require that disruption will occur, "but rather the existence of facts which might reasonably lead school officials to forecast substantial disruption." *Karp*, 477 F.2d at 175.

LaVine v. Blaine School District, 257 F.3d 981, 989 (9th Cir. 2001), *cert. denied*, 536 U.S. 959 (2002). *See Demers v. Leominster School Dept.*, 263 F. Supp. 2d 195, 203 (D. Mass. 2003) (noting that "a reasonable interpretation of the law would allow a school official to prevent potential disorder or disruption to school safety, particularly in the wake of school violence across th country").

In seeking review of the dismissal of Petitioner's claims by this Court, on the grounds that the Story and Petitioner's admitted conduct in disseminating it both constituted a "true threat" and gave rise to the threat of substantial disruption to school activities, Petitioner argues that both the District and Circuit Court acted contrary to the holdings of other circuits and this Court. However, while it is certainly true that in most instances the relevant facts concerning whether student statements or expressions constitute a "true threat" or give rise to reasonable concerns of threats of substantial disruption of school activities are not necessarily fully before the court in the pleadings, in this case all of the relevant facts were admitted by the Petitioner in the pleadings. And this included the statements made by his mother at the disciplinary hearing, incorporated by reference therein, expressly admitting that Petitioner had actually succeeded in repeatedly communicating the Story to other students, including the young girl Shanna, who is depicted in decidedly embarrassing, threatening and inappropriate ways.

This is significant because, as this Court has noted, "[t]he inquiry into the protected status of speech is one of law, not fact." *Connick v. Myers*, 461 U.S. 138, 148 n. 7 (1983). And in this case all of the evidence that was necessary to reach a conclusion as to whether the Respondents were justified in treating Petitioner's conduct as a "true threat" or something

which reasonably forecast substantial interference with school activities or impingement upon student rights was before the District Court and Court of Appeals, as part of — or incorporated by reference in — the pleadings, and it was entirely proper for the District Court and Court of Appeals to consider the allegations in the Amended Complaint, supplemented by the Story, notices provided to Petitioner of hearing, transcript of the disciplinary hearing, and the other documents contained in the Joint Appendix before the Second Circuit, because Petitioner had specifically referenced and relied upon these documents in his Amended Complaint. *See Cortec Industries v. Sum Holding, L.P.*, 949 F.2d 42, 47-48 (2d Cir. 1991), *cert. denied*, 503 U.S. 960 (1992) (holding that a court may consider documents annexed to the movant's papers which, although not annexed to the complaint, plaintiff either had "in [his] possession or had knowledge of and upon which [he] relied in bringing suit"); *Brass v. American Film Technologies, Inc.*, 987 F.2d 142, 150 (2d Cir. 1993) (nothing, in dicta, that, on a motion to dismiss, a court may consider "documents attached to the complaint as an exhibit or incorporated in it by reference, . . . matters of which judicial notice may be taken, or . . . documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit"); *see also Thomas v. Westchester County Health Care Corp.*, 232 F. Supp. 2d 273, 275 (S.D.N.Y. 2002) (holding that the transcript and hearing officer's report from a female civil service employee's disciplinary hearing were properly before the court on the defendant's motion to dismiss, although the documents were mentioned only briefly in the Complaint).

Looking at the allegations in the Amended Complaint, the Story and the transcript of the disciplinary hearing, as well as records of the notices provided of the informal and

formal hearings available to Petitioner, the District Court and Court of Appeals could see:

- A story depicting Petitioner as a child suppressing deeply felt anger at his fellow students;

- A story depicting Petitioner, seeking revenge for being picked on, murdering a number of his fellow students in violent ways;

- Age inappropriate characterizations of sexual activity by ten year old students;

- Repeated references by Petitioner to his fellow classmate, Shanna, whom he depicts as being partially unclothed, engaged in sexual activity with another boy, and whom Petitioner stalks and physically assaults, while killing the boy she was "making out topless" with, as Shanna responds by wiping the blood from her mouth and kissing Petitioner and, as a result, saving herself;

- A drawing by Petitioner of him violently shaking Shanna [JA 59, 228];

- Repeated efforts by Petitioner to read the Story to his classmates. (Am. Cmpl. ¶¶ 17-21) [JA 27]; and

- An admission by Petitioner's mother that Petitioner had discussed the Story with other classmates on other occasions, and read the Story to Shanna [JA 232-33].

Whether or not the Story, and Petitioner's repeated efforts to read the Story to Shanna and his other classmates, could reasonably be perceived by the school's principal and superintendent as a "true threat" or as forecasting substantial interference with school activities or impingement upon the rights of others, is an issue that was determinable from the Amended Complaint (and the records relied upon and/or incorporated by reference therein). *United States v. Viefhaus*, 168 F.3d 392, 397 (10th Cir. 1999); *cert. denied*, 527 U.S. 1040 (1999). ("If there is no question that a defendant's speech is protected by the First Amendment, the court may dismiss the charge as a matter of law.") (citing *United States v. Malik*, 16 F.3d 45, 51 (2d Cir.1994)); *Walker-Serrano ex rel. Walker v. Leonard*, 325 F.3d 412 (3d Cir. 2003) (affirming decision that there was no *Tinker* violation as a matter of law).

CONCLUSION

For these reasons stated above, it is respectfully submitted that the Petition for Writ of certiorari should be denied.

Respectfully submitted,

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No. 06-542

FILED

JAN 3 - 2007

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

DF, by his Parent and Natural Guardian,
ANDREW FINKLE,

Petitioner,

v.

BOARD OF EDUCATION OF SYOSSET CENTRAL SCHOOL DISTRICT; JAMES KASSEBAUM, Both Individually and In His Capacity as Principal of the HARRY B. THOMPSON MIDDLE SCHOOL; and CAROLE G. HANKIN, Both Individually and in Her Capacity as Superintendent of the SYOSSET CENTRAL SCHOOL DISTRICT,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Petitioner, DF, by his parent and natural guardian, Andrew Finkel, petition for a writ of certiorari to review the dismissal of petitioner's amended complaint alleging violations of his procedural due process rights and rights guaranteed by the First Amendment. In opposition, respondents contend that petitioner was afforded all the procedural due

process required under the United States Constitution when he was suspended from school for thirty (30) days, and that the utilization of anonymous student statements to establish the disciplinary charges resulting in petitioner's suspension was not prejudicial. Respondents also contend that a determination at the pleading stages that petitioner's fictional story constituted a true threat and created a substantial risk of disruption was properly based upon the record from the administrative disciplinary hearing.

As explained below, the anonymous statements admitted into evidence at petitioner's disciplinary hearing were necessarily utilized to sustain the charges against DF because those statements were the only arguable evidence that a student felt threatened or harassed. Further, the acceptance of the truth of the testimony contained in the transcript of the disciplinary hearing should not be permissible upon a Fed.R.Civ.P. 12(b)(6) motion because a District Court should undertake its own factual analysis to determine if a First Amendment violation has occurred, and a District Court should not give deference to factual findings arrived at through a school disciplinary procedure.

I. THE ANONYMOUS STATEMENTS ADMITTED INTO EVIDENCE AT PETITIONER'S DISCIPLINARY HEARING WERE NECESSARILY UTILIZED TO SUSTAIN THE CHARGES AGAINST PETITIONER

Respondents contend that the utilization of the anonymous statements at the disciplinary hearing was not prejudicial to the petitioner, and thus there was no due process violation (*see* Brief in Opposition, pp. 15-16). However, petitioner was suspended upon a finding that he had threatened and harassed other students, not any teacher or school administrator. Thus, in order to sustain the charges against petitioner it was necessary to show that some students were threatened or harassed by petitioner's story.

The only evidence submitted at the hearing that could have arguably demonstrated that a student felt threatened or harassed by petitioner's story were statements contained in the anonymous writings submitted into evidence at the disciplinary hearing. The school district's attorney prosecuting the matter obviously felt the need to submit these statements into evidence in order to establish the charges against petitioner. And, that petitioner was charged with wrongful conduct towards other students demonstrates that the subjective assessment of the school's personnel would not have been sufficient to sustain the disciplinary charges that led to petitioner's suspension.

In addition, respondents' contention that under New York law, petitioner could have subpoenaed the students who gave the statements in order to cross-examine them at the hearing does not make any sense since the identities of the students were not disclosed to petitioner. Obviously, the petitioner would not be in a position to subpoena an unidentified student.

Whether the utilization of anonymous statements to establish disciplinary charges against a student would violate procedural due process has been determined by the lower courts with mixed results and without the aid of this Court's guidance (*compare, e.g., Rippy v. Board of School Trustees, Mooresville Consolidated School Corporation*, 2000 U.S. Dist. LEXIS 7427 [S.D.C. Indiana 2000] with *Newsome v. Batavia Local School District*, 842 F.2d 920 [6th Cir. 1988]). Thus, whether a student is entitled to a full factual hearing before he or she is suspended for longer than ten (10) days, and whether utilizing anonymous statements at an evidentiary hearing to establish the charges against a student would violate procedural due process, are issues that should be ruled upon by this Court.

II. THE TESTIMONY AT THE DISCIPLINARY HEARING SHOULD NOT HAVE BEEN ACCEPTED FOR ITS TRUTH UPON A MOTION PURSUANT TO FED.R.CIV.P. 12(b)(6)

Respondents contend that the dismissal of petitioner's First Amendment claim was proper because the factual record required to justify petitioner's suspension was contained in the transcript from the disciplinary hearing, and since the Amended Complaint referenced the disciplinary hearing, the testimony contained in the transcript could be accepted for its evidentiary value upon a motion to dismiss under Fed.R.Civ.P. 12(b)(6) (Brief in Opposition, pp. 20-21).

This Court has held that in the context of First Amendment claims the District Court is required to undertake a de novo review and should not give deference to administrative factual determinations (*Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 [1995]). Here, respondents argue that this rule is inapplicable where there has been a transcript maintained in the context of a school disciplinary hearing, and that a Court may simply rely on the transcript to make a determination as to whether there has been a First Amendment violation.

Respondents' contention effectively eviscerates in the context of school disciplinary hearings the requirement that an independent factual analysis be undertaken to determine First Amendment claims. Whether a separate rule should be established for school disciplinary hearings as compared to other administrative procedures should be determined by this Court.

Here, the disciplinary hearing was conducted without any rules of evidence or procedure, with hearsay statements routinely being admitted, not to mention anonymous written statements by other students. To permit the District Court to accept as true the statements contained in the transcript from

the disciplinary hearing upon a motion to dismiss a First Amendment claim allows into evidence testimony that would otherwise be precluded, and effectively deprives the petitioner of an opportunity to introduce any evidence to support his claim.

This case presents a critical issue to be decided by this Court, *i.e.*, whether deference should be given to factual determination made in the context of school disciplinary administrative hearings when there are First Amendment claims being asserted. This Court has never established such a rule, and while petitioner would contend that such a rule would deprive plaintiff of First Amendment protections previously recognized by this Court, it is an important issue that should be addressed in the context of this case.

CONCLUSION

Accordingly, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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January 3, 2007